SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 227.

JAMES BRYAR, Jr., EMMA S. BRYAR, SAMUEL B. BRYAR, EDWARD S. BRYAR, JESSIE H. BRYAR, HATTIE S. BRYAR, AND SUSAN BRYAR, HEIRS-AT-LAW OF JAMES BRYAR, DECEASED, APPELLANTS,

vs.

THOMAS CAMPBELL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED MARCH 9, 1903.

(17,317.)

(17,317.)

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1 In the United States Circuit Court of Appeals for the Third Circuit.

Be it remembered that on the ninth day of March, in the year of our Lord one thousand eight hundred and ninety-eight, L. C. Barton, Esquire, of counsel for appellant-, appeared in court and files a transcript of record, pursuant to an appeal, in the case of James Bryar, Jr., Emma S. Bryar, Samuel B. Bryar, Edward S. Bryar, Jennie H. Bryar, Hattie S. Bryar, and Susan Bryar, heirs-at-law of Jane Bryar, deceased, as appellants, *vs.* Thomas Campbell, as appellee, which, being read, is in the words and figures following, to wit:

2 In the United States Circuit Court of Appeals, Third Circuit.

JAMES BRYAR, JR., ET AL., Heirs-at-law of Jane Bryar, Deceased, Appellants,
versus
THOMAS CAMPBELL, Appellee.
} No. —, March Term, 1898.

Docket Entries.

Among the rolls, records and judicial proceedings in the circuit court of the United States for the western district of Pennsylvania, at No. 30, November term, 1879, may be found the following words and figures, to wit:

JANE BRYAR, by Her Next Friend, ROBERT BRYAR, Appellee,
vs.
JAMES BRYAR, ROBERT ARTHUR, Assignee, and THOMAS CAMPBELL, Respondents Below, Appellants.

Appeal from decree of U. S. district court for the western district of Pennsylvania. Petition for appeal, allowance of appeal, copy of docket entries, and bond for costs filed August 30, 1879.

1895, Dec. 20.—Præcipe for appearance of L. C. Barton, Esq., for appellee, filed.

1896, Jan'y 28.—Aff't for order substituting heirs-at-law as plaintiff filed and order allowed. Same day motion for an order de-
3 claring appeal deserted and decree affirming decree of district court. Notice of motion to dismiss appeal filed. Same day appellant-' answer filed. Same day order refusing motion to dismiss appeal filed.

1896, Jan. 29.—Petition to revoke portion of order of Jan. 28, 1896, filed.

1896, Feb'y 15.—Service of notice of petition of Jan. 29, 1896.

1896, March 7.—Testimony filed.

1896, Nov. 27.—Case argued. *C. a. v.*

And now, 28th January, 1897, it is stipulated and agreed between counsel, as follows:

That substitution of the heirs of Jane Bryar, deceased, of January

27th, 1896, be taken and considered as regularly filed as a bill of reviver in this case.

And that the answer of Thomas Campbell, filed 28th January, 1896, be taken as a cross-bill.

It is further agreed that the case shall be heard upon the record now before the court. Above agreement filed by leave of court.

1897, Feb'y 5.—Opinion of the court filed with decree as follows: This cause having come on for final hearing upon the proofs, pleadings and written stipulation, was argued by counsel; and now on Feb'y 5, 1897, upon consideration, the decree of the district court is reversed—the costs in that court, however, to be paid by Thomas Campbell; and it is further ordered, adjudged and decreed that the bill of complaint be and the same is dismissed without costs in this court.

BY THE COURT.

1897, Aug. 5.—Assignment of error filed.

And now, August 9th, 1897, a rule is granted upon the defendants to show cause why the appeal prayed for should not be allowed as of August 5th, 1897.

M. W. ACHESON,
Circuit Judge.

1898, Feb'y 8th.—Rule to show cause why appeal should
4 not be allowed made absolute, and appeal allowed as of August 5, 1897. Order filed.

1898, Feb'y 8th.—Citation awarded and returnable March 9th, 1898.

1898, Feb'y 26th.—Citation served upon W. B. Rodgers, Esq.

Docket Entries in U. S. District Court.

JANE BRYAR, by Her Next Friend, ROBERT BRYAR,
vs.
JAMES BRYAR and ROBERT ARTHURS, Pittsburgh.

May 5, 1877.—Bill in equity and affidavit in support thereof filed, the said bill being filed *nunc pro tunc* as of 30th day of April, 1877, the day on which it was presented and argued by Mr. McCord for and Mr. Arthurs against the same and further argument continued until the 5th proximo.

May 5, 1877.—Further argument by Mr. McCord and Mr. Arthurs. *C. a. v.*

Jan. 29, 1878.—Defendants ordered to file answer to said bill before the first of March next, otherwise bill to be taken *pro confesso.*

Feb. 1, 1878.—Copy of order returned "Service accepted."

March 1, 1878.—Answer filed.

March 6, 1878.—Replication filed.

April 20, 1878.—Petition filed, and on motion S. C. McCandless appointed commissioner to take the testimony and make report.

August 15, 1878.—On motion, Thos. Campbell, purchaser, allowed to intervene and make defense.

May 3, 1879.—Petition filed and order granted on James Bryar, Robert Arthurs and Thos. Campbell to close their testimony in thirty days.

June 21, 1879.—Testimony taken before special commissioner filed.

June 25, 1879.—Bill, answer and proofs, argued by Messrs. McCord and Sutton for plaintiff and W. B. Rogers, Esq., for Thos. Campbell. *C. a. v.*

June 26, 1879.—Decree for plaintiff for land described in bill, each party to pay his or her own costs.

5 *Decree.*

This cause came on to be heard on the pleadings and evidence and was argued by counsel for defendants as well as for complainant, and thereupon and upon consideration thereof, the court doth adjudge and declare Jane Bryar to be the equitable owner of the land in suit, and that Thos. Campbell received a conveyance thereof and does now hold the same with notice of and subject to the rights of Jane Bryar therein, and it is ordered and decreed that the said Thos. Campbell do by good and sufficient deed or deeds convey to Jane Bryar or to whom she shall appoint the one undivided half part of that tract of land situate in the 21st ward of the city of Pittsburgh, bounded and described as follows, beginning at a wild-cherry tree, thence north fifteen and three quarters degrees east (N. 15¾ E.) twenty-nine perches (29 p.) to a post, thence south seventy-seven and one-half degrees east (S. 77½ E.) twenty-five and two-tenths perches to a post ($25\frac{2}{10}$ p.) thence south four degrees west (S. 4 W.) forty-nine and four-tenths perches ($49\frac{4}{10}$ p.) to a post, thence north forty-seven degrees west (N. 47 W.) thirty-nine and three-tenth-perches ($39\frac{3}{10}$ p.) to the place of beginning, free from all incumbrances done by him or any person or persons claiming by, from or under him, and do account with the said Jane Bryar for all the rents and profits which the said Thomas Campbell has or might without wilful default have received from said land, less a just allowance for taxes and repairs on same and that each party do pay his or her own costs incurred in this proceeding. June 30, 1879, bond for costs on appeal to circuit court filed. July 16, 1879, appeal to circuit court allowed and filed. Dec. 19, 1881, received of Thos. Campbell, respondent, the sum of $28.40 costs, taxed against him as per said decree. June 12, 1896, agreement of counsel to use original record on appeal filed.

6 *Complainant's Bill.*

To the Honorable W. W. Ketcham, judge of said court:

Your orator complains and says:

1st. That Jane Bryar, the complainant in this bill is the owner of an undivided one-half part of a tract of land situate in the 21st ward of the city of Pittsburgh, county of Allegheny and State of Pennsylvania, (formerly Collins township), and bounded and described as

follows, to, wit: Beginning at a wild-cherry tree, thence north fifteen and three-fourths degrees, east twenty-nine perches to a post, (N. $15\frac{3}{4}°$ E. 29 p.); thence south seventy-seven and one-half degrees, east twenty-five and two-tenths perches to a post, (S. $77\frac{1}{2}°$ E. $25\frac{2}{10}$ p.); thence south four degrees, west forty-nine and four-tenths perches to a post (S. 4° W. $49\frac{4}{10}$ p.); thence north forty-seven degrees, west thirty nine and three-tenths perches to the place of beginning (N. 47° W. $39\frac{3}{10}$ p.), containing seven acres (7 a.) strict measure.

2d. That the deed for said property was through mistake or other cause made in the name of James Bryar, one of the defendants herein, instead of to Jane Bryar, the plaintiff herein, who was entitled to the possession and control of said property, she having paid the purchase-money with her own individual funds.

3d. That James Bryar, one of the defendants herein, was, on the 8th day of January, A. D. 1877, decreed and adjudged a bankrupt upon the petition of his creditors, and Robert Arthurs was on the 8th day of February, 1877, chosen assignee of his estate, by the creditors at a meeting called for that purpose, and the register in bankruptcy by virtue of the authority vested in him by his deed of assignment bearing date the — day of ——, 1877, conveyed to said assignee all the property of whatsoever kind, real, personal and mixed, of which the said James Bryar was seized at the time of his adjudication in bankruptcy, including the above-described undivided one-half of said property.

7 4th. That the said Robert Arthurs, as such assignee, has taken possession of this complainant's said property, and is now proceeding to have the same subdivided and sold in parcels; by means whereof complainant's title to said property will be seriously embarrassed by disinterested purchasers or otherwise, when in fact said assignee has no just legal claim whatever to her said lands.

Wherefore complainant prays:

1st. That the said Robert Arthurs, assignee, as aforesaid be restrained from exercising jurisdiction or control over her said land, from partitioning the same or offering it for sale.

2d. That a preliminary injunction be issued against him, the said assignee, until this case can be heard.

3d. That the said James Bryar and the said Robert Arthurs, assignee, be separately required to answer this bill, and state the fact as to how they acquired title, and if it was not by mistake when the title ought to have been made to complainant. If said Bryar claim said lands, may he be required to show in what manner he paid for them, and to whom, and that your honor on the final hearing, will grant such other and further relief as according to the proceedings in chancery and good conscience said complainant may be entitled. And she will ever pray.

JANE BRYAR.

C. W. McCORD,
Attorney for Complainant.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Jane Bryar, the complainant in this bill, being duly sworn, say-that the statements made therein are true as she verily believes.

JANE BRYAR.

Sworn and subscribed before me this 28th day of April, A. D. 1877.

S. C. McCANDLESS,
Clerk U. S. District Court.

8 *Affidavit.*

James Bryar, being duly sworn, says that he is the husband of Jane Bryar, the plaintiff in this bill and one of the defendants therein; that he was married in June, 1852, that his wife Jane McElroy, was a daughter of James McElroy, dec'd. That in 1856 affiant and S. B. McElroy his brother-in-law bought the interest of John McElroy in the estate of his father, James McElroy, dec'd, being seven acres, strict measure, in what is now the 21st ward of the city of Pittsburg, on which I have lived since the fall of 1857, that the deed from John McElroy to myself and S. B. McElroy bears date June 10th, 1856, and is recorded in the recorder's office of Allegheny county, in Deed Book, vol. 164, page 186, and that the said S. B. McElroy and myself held said seven acres as tenants in common, that some time in 1863, S. B. McElroy proposed to convey to my wife Jane Bryar, his undivided half interest in said seven acres held by him and myself as tenants in common as aforesaid in consideration of her surrender of a certain note held by her before marriage, drawn to the order of S. B. McElroy by Eliza B. McElroy and assigned by said S. B. McElroy to Jane McElroy, afterwards my wife, that she surrendered said note to the said S. B. McElroy who made a conveyance of his interest in said land to me, that the deed for said interest was made in my name, through some mistake, as she was entitled to have the title to said property in her name, she having paid all the purchase-money that was paid when she surrendered said note, that said deed was not made in my name through any request of mine, that the correcting of said mistake was neglected after it was discovered and said correction was never made. I was also the owner of a tract of land adjoining the said described seven acres, containing about eleven acres more or less.

JAMES BRYAR.

Sworn and subscribed before me this 4th day of May, A. D. 1877.

S. C. McCANDLESS,
Clerk U. S. District Court.

9 *Affidavit.*

Eliza B. McElroy, being duly sworn, says that she is a sister of the complainant in this bill; that she was also a daughter and heir of James McElroy, who died intestate on or about the 1st day of De-

cember, A. D. 1836, possessed of considerable real estate in the city of Pittsburgh and also in Peebles township, and leaving heirs as follows: Eliza B. McElroy, Mary McElroy, S. B. McElroy, Jane McElroy, Susan McElroy, John McElroy and James McElroy. That a partition of the property of said decedent was made at No. 46, June term, 1850, at which said partition the property was divided into five parts, each of the heirs to take property except Jane McElroy and Susan McElroy, who were to receive in lieu of property the sum of $2,500.00 in money, as by reference to said proceedings will appear. That S. B. McElroy in consideration of the value of the purpart chosen by him was to pay to Jane McElroy her share in money, to wit, the sum of $2,500.00. That affiant became indebted to S. B. McElroy, her brother, for the price of certain repairs made by him upon property taken by her at the partition and gave to him her certain promissory note bearing date the 18th day of March, 1852, for the sum of $1,576.61, a copy of which said note is hereto attached and made a part of this affidavit; that said S. B. McElroy assigned said note to Jane McElroy by assignment dated the 23d day of March, 1852; that afterwards, to wit, some time during the month of March, 1863, affiant being unable to pay the note held by her sister, Jane Bryar, as aforesaid (formerly McElroy), S. B. McElroy agreed to lift and pay said note as a matter of accommodation to affiant, and that on the 18th day of March, 1863, her brother, S. B. McElroy, sent her a letter enclosing said note and informing her that the matter was settled and the note paid.

ELIZA B. McELROY.

Sworn and subscribed before me this 3d day of May, A. D. 1877.

S. C. McCANDLESS,
Clerk U. S. District Court.

10 PITTSBURGH, *March* 18, 1852.

On demand I promise to pay to S. B. McElroy or order fifteen hundred and seventy-six — and sixty-one cents for value received, with interest from date.

$1,576.61. ELIZA B. McELROY.

Endorsed: March 23, 1852, for value received I assign the within to Jane H. McElroy. S. B. McElroy.

Affidavit.

Jane Bryar, being duly sworn, says that she was a daughter and heir of James McElroy, who died intestate about the 1st of December, 1836; that at the partition of her said father's estate at No. 46 of June term, 1850, she was to get money for share in said estate and not property; that her brother, S. B. McElroy, assumed the payment to her of her share and for that purpose assigned to her a note held by him from Eliza B. McElroy, dated March 18, 1852, for $1,576.61, by an assignment on the back of said note bearing date

the 23d day of March, 1852; that in the June following she was married to James Bryar, her present husband and one of the defendants in this bill; that she held said note till some time in March, 1863, at which time S. B. McElroy proposed to convey to her the undivided one-half of a piece of property containing seven acres, on which they then lived, if she would surrender to him the note hereinbefore described; that she did surrender said note and as she supposed had a deed made to her by her brother, which said deed was put on record; that her husband attended to the business in making said bargain and taking said conveyance; that she did not know at the time that said deed was not in her name and for some time afterward; that she has been in possession of said property ever since; that said property was a part of her father's estate, and that she never gave her consent either to convey or en-
11 cumber said property, and that she believes it was a mistake that said title was not made to her instead of to her husband.

JANE BRYAR.

Sworn to and subscribed before me this 3d day of May, A. D. 1877.

S. C. McCANDLESS,
Clerk U. S. District Court.

Order of Court.

And now, to wit, January 29, 1878, on motion of C. W. McCord, Allegheny, for complainant above named, the court grant an order on respondents James Bryar and Rob't Arthurs to answer the bill filed in this case according to the prayer of said complainant in said bill on or before March 1, 1878, otherwise said bill will be taken *pro confesso.*

PER CURIAM.

Answer.

To the Honorable W. W. Ketcham, judge of said court:

The defendant, Robert Arthurs, comes and for answer to the plaintiff's bill filed in the above-entitled case says:

1. He is not informed and is unable to state whether the allegations contained in the first and second paragraphs of the plaintiff's bill are true or false. He does not admit that the said allegations are true and asks that the plaintiff may be required to prove the same.

2. The allegations contained in the third paragraph of plaintiff's bill are true.

3. In answer to the first clause of the fourth paragraph of the plaintiff's bill, he says, that under the direction of your honorable court, he has been endeavoring to sell the property of the bankrupt, conveyed to him by the register of bankruptcy, and unless otherwise ordered by your honorable court, he intends to sell the same. He

is not informed and is unable to state whether the allegations
12 contained in the remainder of said paragraph are true or false; but he does not admit that they are true and asks that the plaintiff may be required to prove the same.

ROBERT ARTHURS,
Assignee of Jas. Bryar.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Robert Arthurs, above named, being duly sworn, says the facts stated in the foregoing answer are true as he verily believes.

ROB'T ARTHURS.

Sworn to and subscribed this 1st day of March, A. D. 1878.

S. C. McCANDLESS, *Clerk.*

Replication.

The replication of Mrs. Jane Bryar, complainant, to the answer of Rob't Arthurs, respondent.

This repliant saving and reserving unto herself now and at all times hereafter, all and every manner of benefit and advantage of exception which may be had or taken, to the manifold insufficienc es of said answer for replication thereunto says: that she will aver, maintain and prove her said bill of complaint to be true, certain and sufficient in law to be answered unto and that the said answer of the said defendant is uncertain and insufficient to be replied unto by repliant.

All which matters and things this repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct and humbly pray as in and by *their* said bill *they* have already prayed.

C. W. McCORD,
Solicitor for Complainant.

13 *Order Allowing Thomas Campbell to Intervene.*

And now 15th August, 1878, on motion of Rodgers & Oliver, attorneys for Thos. Campbell, the purchaser at assignee's sale of the property referred to in the bill and a lien creditor of said James Bryar, the said Thomas Campbell is allowed to intervene and make defense to the bill.

PER CURIAM.

Amended Prayer.

And now, to wit, June 1879, complainant granted leave to amend the prayer of the bill by adding thereto—

"That upon final hearing of this cause, the court may order, decree and require the defendants to make, execute and deliver to complainant good and sufficient deed or deeds for the one undivided half of all that tract or parcel of land situate in the 21st

ward of the city of Pittsburg, county of Allegheny, State of Pennsylvania, bounded and described as follows: Beginning at a wild-cherry tree, thence north fifteen and three-fourths degrees east twenty-nine perches to a post (N. $15\frac{3}{4}°$ E. 29 p.), thence south seventy-seven and one-half degrees east twenty-five and two-tenths perches to a post (S. $77\frac{1}{2}°$ E. $25\frac{2}{10}$ p.), thence south four degrees west forty-nine and four-tenths perches to a post (S. 4° W. $49\frac{4}{10}$ p.), thence north forty-seven degrees west thirty-nine and three-tenths perches to the place of beginning (N. 47° $39\frac{3}{10}$ p.), containing seven acres strict measure (7 a.), being the same tract of land described in paragraph one (1) of bill."

14 *Deposition of Witnesses*

Taken before S. C. McCandless, commissioner appointed for that purpose, this 23d day of April, 1878, at 10 a. m., pursuant to notice given by C. W. McCord, Esq., attorney for complainant, and at his request, at the clerk's office of said court, in U. S. building.

Present, Mr. McCord, who states that he notified all the attorneys of all the parties in interest of the time and place fixed for the taking of said testimony, at least as far as he knew of said parties.

SAMUEL B. MCELROY being sworn and examined by Mr. McCord, says:

I am a brother of Mrs. Jane Bryar, the complainant. On the division of my father's estate I became indebted to Mrs. Jane M. Bryar about the year 1850, for the full amount of her interest therein, which, I think, amounted to in the neighborhood of twenty-five hundred dollars. My sister, Eliza McElroy, improved a piece of property which I advanced her the money to do, and on the settlement with her, on the 18th of March, 1852, she owed me $1,576 61, for which I took her note of that date, and assigned it to Jane McElroy, my sister, on the 23d March, 1852, in part payment of the account that I owed her.

The note attached to complainant's affidavit (of Mrs. Jane Bryar), filed May 5, 1877, handed witness, who says that is the original note.

In March, 1863, I paid this note by transferring my interest in the property bought by James Bryar and myself from my brother John M. McElroy, which property was his (my brother's) interest in my father's estate, consisting of about seven acres of land, then situated in Collins township, Allegheny county, Pennsylvania, but now in the 21st ward of the city of Pittsburg. Mr. Bryar and myself bought this interest of John M. McElroy, June, 1856. We never divided it. We held it as tenants in common up until I made a deed in 1863—some time in March, 1863.

15 James Bryar, spoken of, was, and still is, the husband of my sister Jane.

The consideration which I received was the surrendering of this note by Mrs. Jane Bryar. I considered myself liable on this note

and wanted to see it paid. Mrs. Bryar agreed to take this property and surrender this note.

My impression was that the deed was made to Jane Bryar. I think so still. I always regarded that piece of property as hers. He, James Bryar, had no interest in any way in that property conveyed by me to my sister Jane.

I don't believe the deed was made to James Bryar. The more I think about it the more fully I am convinced that it was made to Jane Bryar. The deed was brought to me when busily engaged in my business, but still I don't think that I would have signed it had I discovered that it was made to James Bryar—I certainly would not have done so without first consulting my sister Jane.

S. B. McELROY.

THURSDAY, *May* 16, 1878.

Charles W. McCord, Esq., attorney for complainant, appears and states to the commissioner that he notified all parties in interest that he would appear before the commissioner on the said day at one o'clock in the afternoon to continue the examination of witnesses.

Mrs. JANE BRYAR, being sworn says: I am the complainant in this case. I am about 45 years of age. I am the wife of James Bryar. I was married in 1852. My name, prior to marriage, was Jane McElroy. I am the daughter of James McElroy, who died in 1836. My father, at the time of his death, owned real estate. There were seven heirs—three boys and four girls. After my father's death—I think in 1850—there was a partition of his estate. I was to get for my share of the real estate the sum of $2,500.00 in lieu of my share. Under the partition, my brother Samuel McElroy, was to pay me that sum. My brother Samuel paid me a portion of that sum soon after that partition in cash. As payment
16 of the balance he assigned to me a note of Eliza B. McElroy for $1,576.61.

Note attached to complainant's affidavit filed in this case handed witness, who says:

That is the note assigned to me. That note, when paid, was to be in full satisfaction of my interest in my father's estate. Neither Eliza B. McElroy, the maker of the note, nor Samuel McElroy, the assignor of the note, ever paid me the amount of that note in cash.

In 1856 my brother Samuel and my husband bought the seven acres from John McElroy, another brother. We (my husband and self) moved on it. In 1863 my brother Samuel came to me, and asked me if I was willing to give that note for the undivided interest in that seven acres. I considered the matter and concluded to do it. Then, soon after, I gave the note to my husband, and he took it for the purpose of arranging the matter and getting the deed. There was nothing said about whose name the deed would be made in. I thought it would be made out in my name. I did not know at the time that the deed was not made in my name, and did not know that until some time afterwards. I have been living on the property

ever since. After I had discovered that the deed had not been made out in my name, but in the name of James Bryar, my husband, I repeatedly called his attention to the matter, and asked him to have it corrected, and he would reply that it was perfectly safe. This matter was talked over and these requests made long before the proceedings in bankruptcy in the United States courts. Mr. Bryar, my husband, never paid any money, to my knowledge, for this property. The agreement for the surrendering of the note and the transfer of the property was made entirely between myself and my brother Samuel. I was never consulted, and never knew of any mortgages or other incumbrance being put upon this property. If it was so incumbered, it was done without my knowledge or consent.

17 At the time this transfer was made my husband owned real estate adjoining this seven acre tract, and also some other lots. The tract adjoining the seven acres contained about eleven acres.

JANE BRYAR.

Adjourned until Tuesday, the 21st May, 1878, at 2 p. m.

TUESDAY, *May* 21, 1878.

Met pursuant to the foregoing adjournment.

Present: Charles W. McCord, Esq., attorney for the plaintiff.

ELIZA B. MCELROY being called, sworn and examined, says:

I am a sister of Mrs. Jane Bryar, the complainant, and a daughter of James McElroy—the oldest daughter of James McElroy, who died in 1836. My father at his death was possessed of certain real estate. He left seven heirs, as follows: Myself, Eliza B. McElroy, Mary McElroy, S. B. McElroy, Jane McElroy, Susan McElroy, John McElroy and James McElroy. The property was divided in the orphans' court. My father did not make a will. I think the property was divided about 1850. The real estate was divided into five parts. Jane and Susan—Mrs. Bryar and Mrs. Torrence—were to get their share in money. S. B. McElroy was to pay Mrs. Bryar about $2,500 for her share, and my sister Mary was to pay Susan about the same amount for her share. Brother Samuel advanced me money to improve my share of the property. I gave him a note for this money which he advanced me.

Affidavit of Mrs. Jane Bryar handed witness, who says:

The note attached is the note I gave my brother Samuel. He transferred the note to Mrs. Jane Bryar, my sister, and notified me that I had to pay her instead of him (Samuel). It was some time in '52 that he notified me. I didn't pay the note, being unable,

18 but Samuel agreed to lift it for me. It was in '63 that he agreed to lift it for me. He lifted it for me, and sent it to me. He sent a letter along with it.

Affidavit of Mrs. Jane Bryar handed witness.

The note attached is the note I received from Samuel, and the letter attached is the same that I received from him at the same time with the note.

I was not present when the negotiations were going on between Samuel McElroy and Mrs. Bryar concerning the transfer of that property. All I know as to the payment of the note is hearsay.

ELIZA B. McELROY.

Adjourned until Tuesday, the 28th day of May, 1878, at 1 p. m.

TUESDAY, *May* 28, 1878.

Met pursuant to the foregoing adjournment.

Charles W. McCord, Esq., attorney for complainants, appears and states that he gave notice of this hearing to all parties in interest.

THOMAS J. KEENAN Esq., called, sworn and examined. He says:

I am an attorney. I superintended the making of the schedules in bankruptcy of James Bryar, a bankrupt in the district court of the United States. I was only assisted in the clerical part of the work. I was the only attorney engaged in the case. The making out of the schedules occupied, I should think, a couple of days or more, during which time James Bryar, the bankrupt, may have been in and out of the office several times—for a short period of time, but I am not absolutely certain that he was in the office at all while the papers were being prepared. After they were prepared, I took the papers out to his house one evening for him to sign them. James Bryar, Jr., son of James Bryar, bankrupt, was present during the time I was preparing the papers, and from him I got much of the information necessary to make out the papers. I also got information from deeds, and from an abstract of title made by Cozad,
19 Thompson & Co., abstractors of titles. James Bryar, Jr., acted as clerk in writing up the schedules when I took the papers to Mr. Bryar's house, I read and explained the same to him, and he signed them—the several sheets in their order. I did not get any of the information necessary to making out the papers from James Bryar, the bankrupt, or at least not that I can recollect. At the time Mr. Bryar was sick. The papers were made out by order of court. While making them out Mr. Bryar was sick, and I had no opportunity to see and consult with him, or at least very little opportunity. On the evening when I called to have him sign the papers he was indisposed, and took but little time to make an examination of them. At the time of making out the schedules, I think the deed for the property in the 21st ward, Pittsburgh, was not before me. I did not examine the title to see how or why the property stood in his name.

THOS. J. KEENAN.

JAMES BRYAR, JR., being called, sworn and examined says:

I am a son of James Bryar, the bankrupt alluded to. I was present with Mr. Keenan at the time of the making out of the schedules in bankruptcy. I believe I furnished him with most of the information concerning the real estate. The remainder of it was furnished from deeds and other papers—a list of mortgages.

At the time of making out the schedules, we did not have before us the deed for the seven acres of land situated in the 21st ward, Pittsburgh, nor for the eleven acres adjoining it. I furnished Keenan with the information concerning the seven and eleven acre tracts. There had been some sold off, and I gave it to him as containing seventeen acres, and gave a very general description of it, as being situated on Frankstown avenue. My father was not present in the office while we were making out the schedules as to this seventeen-acre tract. I was not at all acquainted with the way in which my father came into possession of the seven-acre tract. I did not know anything about my mother's title or interest in this seven-
20 acre tract until after the schedules had been made out and filed, after which time Mr. McElroy had been down to the *the* house and had talked to my mother about it, when she talked the matter over with me. I knew nothing about this at the time we were making out the schedules at Mr. Keenan's office. If I had known it, I certainly would not have returned it at seventeen acres. I would have reserved my mother's interest.

JAS. BRYAR, JR.

Adjourned *sine die*.

THURSDAY, *July* 11, 1878.

Charles W. McCord, Esq., appears and informs the commissioner that the taking of testimony on the part of the plaintiff is closed.

FRIDAY, *June* 13, 1879.

Met pursuant to arrangement between Chas. W. McCord, Esq., attorney for complainant, and W. B. Rogers, Esq., attorney for Thomas Campbell, purchaser at assignee's sale.

Mr. Rogers calls Mrs. Jane Bryar for cross-examination.

Mr. McCord objects to the testimony being taken for cross-examination, for the reason that due notice was given to the respondent at the time of the taking of testimony, where an opportunity was given to cross-examine the witness, but that they failed to appear at that time, that the witness now appears in obedience to the subpœna of the respondents, and is their witness.

Mrs. JANE BRYAR, on cross-examination, says:

I think my brother Samuel McElroy paid me four or five hundred dollars on account of that note. He paid me that sum at the time he gave me the note, when the property was divided. This was not paid on account of the note. At the time of the partition my brother Samuel owed me about $2,500.00. As an evidence of that indebtedness he gave me that note. It was—the note was for $1,576.00 and some cents, I guess. Besides this he gave me
21 four or five hundred dollars in cash. I got nothing to show for the difference between what he owed me ($2,500.00) and the note and cash. He gave me this note two years after the partition. I had nothing to show for my indebtedness in the meantime. At the time there was no settlement—he just gave me the money and the note. He fixed the amount of the note.

Q. Why did you not, at the time you received the note from your brother, require the payment of the balance due you, with the interest thereon?

A. I don't remember why I did it. He gave me the note.

When he gave me the note and money, I gave him a receipt for the money. I gave him no receipt for the note. There wasn't any time specified for the payment of the note.

Eliza B. McElroy is my sister. When I got the note I kept it in the trunk. I kept it there 11 years. I saw Eliza B. McElroy in the meantime. She paid one year's interest, I think. It was the first year's interest that she paid. She wasn't able to pay any more on the note. During this time she had a share in my father's estate—the same interest therein that I had. She never gave me anything at all for that note. During that time my brother Samuel B. McElroy never gave me anything—cash or collaterals—on account of that note. My sister, during this time, did not promise to pay me anything on that note, nor did my brother promise to pay anything. My sister often said she would like to pay it if she could. I had no conversation during the eleven years with my brother Samuel on the subject. At that time my brother Samuel's financial condition was very good.

Adjourned until Saturday, the 14th instant, at 10.30 a. m.

22 SATURDAY, *June* 14, 1879.

Met pursuant to adjournment.

Present: C. W. McCord, Esq., and W. B. Rodgers, Esq.

Continuation of Mrs. BRYAR'S testimony:

My brother Samuel McElroy, first made the proposition about the sale of that interest in the seven-acre tract. No one was present but ourselves. I did not know that he had spoken to my husband about it before. He asked me if I was willing to give the note for that interest, that he considered he was the indorser and that it was his duty to see it paid. It was worth at that time, I should think, two or three thousand dollars per acre—more at least than it is now. The amount of the note at that time was, I think, about $2,500. I gave him an answer at that time—that I was willing to give it. I consulted nobody. I took, I think, about a week or so to deliberate upon it.

Q. I asked you, Mrs. Bryar, if you gave him an answer at the time. You said you did. You now say you took a week or so to deliberate. How is that?

A. I only seen him a short time before the transfer was made. Then I gave him an answer. It was the first time I saw him.

I don't think I took a week to deliberate. I only saw him a short time before. I told him I was willing to give that much—the note for the property. This conversation wasn't very long, about an hour. I have given you all that was said during that hour. There wasn't much said. This conversation was at our own house, in the

afternoon, if I remember. My husband was not at home at the time.

I can't remember when I first told any one of this transaction with my brother. I think I first told my sister.

Q. When did you first tell your sister of this arrangement?

A. I think that day.

23 My sister was living with us at that time. She was not present at the conversation between my brother and myself.

I don't recollect of telling any one else.

Q. Did you tell your husband?

The commissioner having understood the witness to answer the last question "No" before he had time to record the same, asks her now if he understood her correctly. She says she believes she did answer the question "No."

Question read to the witness.

A. I did at the time that I gave him the note.

I gave him the note, I think, a few days after we made the arrangement. It was the first that Mr. Bryar knew of the matter. I told Mr. Bryar I was going to give that note for the property. That was all I told him. I don't remember what he said. I suppose he said something, but I don't remember what. There was nothing said about arranging about getting the deed. There was nothing said to Mr. Bryar about what property was to be got. I can't remember when I next spoke to Mr. Bryar about the matter. Can't remember what time it was. I can't remember whether it was a week or a month. It might have been more than a month or a year, I don't remember. I haven't the faintest recollection when I first mentioned the matter to Mr. Bryar after I gave him the note. I can't remember what the first conversation with Mr. Bryar was after giving the note. I remember a conversation about the deed, but don't remember what it was.

Q. How does it come, Mrs. Bryar, that you remember the conversation about the deed, when you don't remember what it was?

A. Well, I can't remember.

The commissioner here asks the witness if that is all her answer, and she says:

24 I remember of asking Mr. Bryar some time before going into bankruptcy, a year or two, about the deed. At the time I asked him about the deed, I asked him if the deed was made in my name and all right. I refer now to the conversation about a year or two before he went into bankruptcy, about the times he went into the lumber business. He was about going into the lumber business then. I don't remember why I asked him then. I asked him I thought——

Q. Please finish your sentence.

A. I can't remember what I was going to say. I don't know of any reason for asking Mr. Bryar at that time about this deed. I think that was the first time I asked him. He at that time said the deed was made in his name. I then asked him if he would have it made right, or made in my name. He said there's no danger of

me (the witness continued) losing it, it's all right. He said nothing more. I said nothing more. I can't remember that I ever spoke to him again on the question. My husband paid the taxes on this property. I do not know Mr. McClintock or Mr. James, who have a mortgage on this property. I have seen Mr. James but not Mr. McClintock, I don't know him at all. I have seen Mr. James at our house a few times. I can't remember the time I first saw Mr. James at our house. He lived near us, I can't remember when I first saw him; I don't know what his business at our house was.

Q. Don't you know Mrs. Bryar, that at the time Mr. Bryar went into the lumber business, there were mortgages against this property given by him?

(Objected to as leading.)

A. No, sir. I did not ascertain that fact until he went into bankruptcy.

Q. When did you first ascertain that Mr. Bryar was in debt?

A. After he went into bankruptcy, I knew then he was in debt.

(Counsel repeats the question and requests an answer.)

25 A. Some time after he went into bankruptcy. That was the first that I knew he was in debt. I can't remember how long—a few days after—I didn't then get an idea of how much he was in debt. I thought when he went into bankruptcy he was in debt. He did not tell me when he went into bankruptcy; he never told me anything, I never asked him. When he went into the lumber business he purchased the mill, I think—the planing mill—it was in East Liberty.

Q. From whom did Mr. Bryar buy this mill?

A. Well, I can't tell. I never heard. Mr. Bryar never told me. I do not know what he paid for it; I do not know where he got the money to pay for it.

Cross-examination by Mr. McCORD:

I have testified that my brother Samuel gave me four or five hundred dollars and this note.

Q. I now ask you if you agreed at that time to take this cash and this note in full of your claim against him for your interest in your father's estate?

(Objected to as leading—the question should be, "How did you take it?")

A. Yes.

Q. Was that the reason why you did not require your brother to pay you the difference or give you something to show for it?

(Objected to as leading.)

A. Yes, sir.

Q. Was the amount of that note not fixed in the settlement between your brother and sister, Eliza, and offered to you as the paper of your sister, Eliza?

(Objected to as leading and incompetent.)

A. Yes, sir.

The note was given in '52. In '63, eleven years after, this arrangement was made when I gave up the note.

Q. Who did the business for you in handing over that note and getting the deed, if you remember?

A. I can't tell. I sent the note to my brother by my husband.

26 Q. Was that in pursuance with your agreement with your brother?

A. Yes, sir.

Redirect by Mr. RODGERS:

Q. You said, Mrs. Bryar, in answer to a question I asked you' that your husband went into the lumber business—how do you know he went into the lumber business?

A. Well, I heard him speak about it. He was saying something to me about it. He said something to me about purchasing a mill. He said he thought he would go into that business. Don't remember anything more. He said it was that mill, near the railroad, at East Liberty. I believe that was the mill that he afterwards took possession of. I don't remember how long that was before he took possession of it. I don't know who it belonged to.

JANE BRYAR.

Adjourned till Monday next at 1 p. m.

MONDAY, *June* 16, 1879.

Met pursuant to adjournment.

Present: Chas. W. McCord, Esq., and W. B. Rodgers, Esq.

Mr. Rodgers calls JAMES BRYAR, who being sworn says:

I am the husband of Mrs. Jane Bryar. Robert Bryar is a nephew of mine. He lives here in the city.

Q. After the conveyance of the seven-acre piece to you and S. B. McElroy, did you enter into the possession of it?

A. No, sir, not at that time, there was a tenant on the place at the time. I cannot tell exactly what time I went into possession of it. I cannot tell exactly the time. It was probably a year after. There was a tenant on it. At the time we went into possession of it, it wasn't improved much. The improvements were bad. The fences were out of repair. There was an old dwelling and

27 barn on it. I improved the property. The first improvement, I think that I made was the fences. The next was in the fall of '56 or spring of '57 I made a contract for building a house, a two-story brick. It cost, I think—the contract was $2,675. After that we built a coal-house and a wash-house; the same carpenter did the work. There was no contract for it. Don't know what it cost. Made no other—yes, before we begun the house we dug a well and cistern. There were no other improvements at that time. Made no other improvements. About the first thing before

we built the house, we put out about one hundred apple trees. These things were all paid for with my own money.

Q. After March, 1863, what improvements, if any, did you put upon this property?

A. I am not able to answer that. We built one stable, but do not know whether it was before or after that. Oh, yes, we put a two-story wing to the house after March '63—a dining-room and two small rooms above. Don't recollect the year; think it was after '63.

That cost, well, it was either $1,100 or $1,175, but don't recollect just which sum.

I know Mr. James, I executed a mortgage on this property to Mr. James. It was the first week, perhaps, of Sept. '74. The mortgage called for $5,000. Mr. McClintock and Mr. James went in together and took the whole mortgage, I got the money.

Q. Did you execute another mortgage on this, together with some other property for $2,500.00?

A. Yes, sir.

I don't think I had, at that time, a conversation with Mr. Robert Arthurs in regard to the mortgage. Had no other mortgages on the property—didn't know of any. I had no conversation with Mr. Arthurs in which I told him that the property belonged to me. Had no conversation with Mr. Patrick about the mortgage, and did not tell him the property belonged to me.

28 Q. How did the seven acres come to be included in the Patrick mortgage?

A. The mortgage just covered the property—the seven acres and improvements. I think that is all the mortgage called for.

Q. How did you come to give this mortgage upon the seven acres?

A. I wanted the money at that time to pay off some claims upon which suit had been brought against me.

Mr. Keenan drew up the mortgage, I think, for me. I suppose I gave him the description. I think Mr. Keenan wrote the McClintock & James mortgage, and I suppose I gave him the description, too.

I paid for the wing put in the house. I paid the taxes all along on the seven-acre piece till '76. McElroy never took possession of it—the seven-acre piece. I paid him no rents and gave him no profits out of this property while he held the undivided one-half. I don't know what the taxes were. They were levied on the whole piece—eleven acres and seven acres. I recollect one year they were very heavy, amounting to $60 per acre.

I do not know who wrote the deed for McElroy's half. John Mellon was my counsel, but I do not know whether he wrote it or not. I think I put it on record. It came into my possession after it was recorded, and remained in my possession until my assignee in bankruptcy got it.

I know Thomas Campbell. Had dealings with him—trading for a planing mill. I didn't make the bargain. I think James L. Ferson made it. Mr. Ferson was Mr. Campbell's partner. He was also my partner for about—from September to May, I think. He

had been Mr. Campbell's partner, and when I got the mill he (Mr. Ferson) still retained what interest, if any, that he had had in ti.

From '52 to '63 Mr. Samuel B. McElroy was in the wholesale dry goods business. I was endorser for him, but it was after '52—after old Mr. Knox died—yes, after '63.

29 I was in the liquor business till I went into the lumber business—the wholesale liquor business.

Down to '74 my financial standing was very good. I did not begin to get embarrassed till after I went into the lumber business. It was after I went into the lumber business that I made this loan from McClintock & James. It was before I borrowed this money from McClintock & James to pay Mr. Campbell.

Adjourned till Wednesday next at 9 a. m.

Deed handed witness and he is asked to state what it is.

A. That is the deed for S. B. McElroy's interest.

Deed presented, identified by the commissioner and marked Exhibit A, and offered in evidence.

Paper presented, identified by the commissioner, marked Exhibit B, and offered in evidence.

Q. What is Exhibit B?

A. It is the draft of the place—the whole tract. I don't know the engineer or who got this draft made.

I do not remember of giving to Thomas Campbell, about the 7th of December, '75, this draft (Ex. B) and that deed (Ex. A) for the purpose of procuring a mortgage at three years for $25,000 on the seven acres and the eleven acres.

The first that was ever thought of making a mortgage was about February, 1876, and it was given to W. W. Patrick, who thought he could get the money from a Philadelphia party. That first mortgage was returned. The party wanted the form used in Philadelphia, and it was then next made over to W. W. Patrick—the second mortgage. He failed—couldn't get the money. Either Mr. Robert Arthurs or Halsey Williams told me that he thought he could get the money from an insurance company at Chicago. I met Mr. Arthurs on the corner of Liberty and St. Clair St., and he told me to have Mr. Patrick transfer the mortgage to Mr. Geo. I. Whitney, as they—national banks—weren't allowed to take

30 mortgages, or something to that effect. Don't recollect of a mortgage being prepared by Thomas Campbell's attorney.

I never seen this plan (Exhibit B) before. This is the first time I ever heard of it. There was an old plan made by Patterson and this may have been made from it. I never heard of I. H. Harlow before.

Cross examination:

We moved on the property in September 5th, I think. We were living on the property at the time the deed was made by McElroy. We were living in the new house mentioned as being built by me

prior to the time the deed was made. At the time I built that house and made the other improvements spoken of, McElroy and I were holding the property as tenants in common. Never had any conversation with McElroy while building and making the improvements concerning the improvements of the property. Never had any understanding with McElroy about the improvements.

Q. What were you going to say that he told you?

Objected to as incompetent.

A. I was going to say he told me at one time that I might go on and improve as he thought he would not move out there onto the place.

He told me nothing at all about the improvements that I can recollect of.

Q. Mr. Bryar, at the time Mrs. Bryar gave you this note for the purpose of taking it to McElroy to have the deed made, did she give you any instructions as to the business?

Objected to as leading, incompetent, and not cross-examination.

A. Nothing more than she told me to take it in to "Sam." and he would give me the deed.

31 Q. Did you pay anything for this interest of which this is the deed?

Objected to as not cross-examination.

A. Nothing.

Q. Was that deed made in your name by your request?

A. No, sir. I know nothing about the deed other than I took the note and received the deed.

I do not know who made out the deed. It was McElroy who procured it to be made. If I had got it made I would have got it made by Mr. Mellon, and it is not in his handwriting.

Q. Who did pay for this property?

Objected to as not cross-examination.

A. My wife paid for it by giving a note which she held drawn by her sister and endorsed by her brother, S. B. McElroy. I never seen that note, not more than once, if I seen it at all, before the time she gave it to me to carry to McElroy.

I got the deed, I think, perhaps, the same day that I brought in the note. I put it in the safe; I don't think it was taken to the recorder's office at the time.

I had the deed in my possession all the time except when it was at the recorder's office being recorded. I retained possession of it till the time I handed it over to my assignee. I kept it in my safe in the office at the store.

The McClintock and James mortgage was the first I put on this seven acres.

Q. Did you consult Mrs. Bryar about putting that mortgage upon the seven-acre piece of property, or did she have any knowledge what you were going to do?

Objected to as not cross-examination.

A. No, sir, she had no knowledge whatever of it—knew nothing about it.

32 I got that money to pay Mr. Campbell for the planing mill. Mrs. Bryar had no interest in it—the mill. She reaped no benefit from that property—that loan.

Never got a cent on the $25,000 mortgage. I think the negotiation for that mortgage failed.

Q. Was Mrs. Bryar consulted about that mortgage?

Objected to as last above.

A. No, sir, she knew nothing about the mortgages. She was opposed to mortgages on the place. She found out about it afterwards, but how, I don't know.

Q. Did Mrs. Bryar ever ask you to have that matter fixed—that is, put in her name?

Objected to as not proper cross-examination.

A. Yes, sir; several times she was at me to make a deed over to her for her interest in it. Just after I went into this planing mill she began to get uneasy about it, and asked me to make a deed to her.

Q. At that time had she any knowledge of this mortgage?

Same objection as last also.

A. No, sir; no knowledge of the McClintock and James mortgage, and not for a long time after. I never wanted her to know anything about them, as she was opposed to them.

Mrs. Bryar and myself continued in possession of this property from the time it was deeded to us till we were forcibly ejected therefrom.

Redirect examination:

Q. How were you ejected from the property?

A. Well, there was an order from the court for us to give it up. I was not at home. Mr. Campbell came out with the order and read it to the boys, I think. We didn't give up then. He sent out a constable to make a levy for taxes. Mr. Arthurs hadn't paid the

33 taxes for '77. Then we came in, I think to Mr. McCord, who wrote a petition to the court for a restraining order. They kept levying, adjourning the sale, and putting on watchmen, then taking them off. I came in and offered to pay $75.00 on account of taxes, which the collector—the deputy—the collector not being in—refused to take. I thought it was better to try to save our furniture, and I rented a house and we moved, I think that same evening. I saw they were determined to force us out of possession of our property. There was no watchman there the day I went out.

I cannot say the first time I saw this note. It was when my wife was looking over some papers in her trunk. Before the day on which my wife gave me the note, I had heard of the trade being

made. I suppose I heard it from the folks at home—from my wife perhaps. I don't know anywhere else I could have heard it. I heard that they had made a trade. McElroy had been at me several times to have it, the trade, made. He sent other parties to me about it. I wouldn't consent, wouldn't have anything to do with them. I thought he wanted the best of the trade. My wife, when she gave it to me, just told me to take it to McElroy and get the deed. It was the first time I had it in my possession. Had I had it, I would likely have had it collected before that time. When I got it, I took it and brought it to McElroy. I think he came to the store with the deed and gave it to me. It was the same day I think, and I think that was all that passed between us. At the time he brought me the deed I handed him over the note I think. I didn't recollect whether I read over the deed at the time or not. I may have looked at it to see if it was signed by McElroy and wife, but don't know that I read it over. I made no calculation at the time to see what was due on the note. I couldn't even tell you the amount of the note. I never saw it more than once, if at all, during the whole time she had it. I do not know whether or not I noticed the consideration in that deed. I noticed, perhaps, to whom the deed
34 was made. I didn't think McElroy remained long enough with me to have me say anything about it. Said nothing to my wife about it other than that evening when I went home, my wife asked me, I think, if the deed was made in her name, and I answered "O yes, it is all right." I think that was all that passed. That part of it was not true (I never gave any directions to have the deed made in my name, and knew nothing about it till I got it.) I told my wife that, as far as I knew, to please her. I do not recollect when she next spoke to me about it. I do not know how long after. I can't fix any time. I suppose she spoke to me about it both before and after I went into bankruptcy. I do not recollect what she said to me about it. I told her that I thought after paying everything we would have enough left. At this time she knew the deed was in my name. She knew it before—perhaps before I went into bankruptcy. She may have known from my eldest boy whom I blamed for keeping her posted. His name was James Bryar, Jr., I do not know that he examined the records.

JAS. BRYAR.

Adjourned till Friday next at 9.30 a. m.

FRIDAY, *June* 20, 1879.

Met pursuant to adjournment.

Present: Wm. B. Rodgers and Chas. W. McCord, Esq.

THOMAS CAMPBELL being called, sworn and examined, says:

I am purchaser of the "seven acres" at assignee's sale, and have received a deed for it.

I was a creditor of Jas. Bryar. The indebtedness was for a planing mill and for lumber. The sale of the mill was made the latter part of September or the first of October, 1874. At that time, the 1st of October, 1874, I took James Bryar's notes, as follows: One note for $9,993.53, October 1, 1874, at 5 months. Same date, October 1, 1874,

for $8,257.65 at 8 months. Same date, October 1, 1874, for $8,466.74, at 12 months. These were notes given. When the first one
35 came due there was $5,000 paid on the first note. The second and part of the first note—the balance—were renewed. When the second note and renewal of the balance of the first note became due they were both renewed. The 12-month note—there was never anything paid on it. The balance of the first note and the second with some interest, aggregated $13,826.74. One of those notes was paid—$6,913.37. I did not at the time it came due, bring suit but did some time after. I brought suits on two notes—one against Bryar and Henry and another against James Bryar, who was a member of the firm of Bryar and Henry. I obtained judgment. I never received anything on those judgments from Bryar and Henry, nor James Bryar. Before I took this paper I did not have any conversation with Mr. Bryar as to the property he owned. I examined the records—had them examined by my attorney. It was reported to me that the seven acres was in his name—that he owned the property. Concluded then that the man was perfectly good for the property I sold. I made no sale till I had the record examined as to the standing of James Bryar.

Exhibits "A" and "B" handed witness, who says:

I seen this and this plot. I saw them first some time in 1875. Saw them in James Bryar's hands. He gave me those papers. He gave them to me to make a mortgage for $25,000. I offered to take a mortgage on this property for that amount. The mortgage was made and taken to James Bryar by me. I wanted this mortgage to secure my claim and pay off a mortgage that was on the property, and gave him some money. He wanted more money than I was willing to give. He didn't sign the mortgage.

At the time of taking of James Bryar's paper I had no knowledge or intimation of Mrs. Bryar's claim to this "seven acres." I hadn't any at the time of obtaining judgment—in fact not until after the bankruptcy and after the bill was filed.

36 Cross-examination:

At the time I took this paper I would not have considered James Bryar worth it had he only owned the eleven acres without the seven-acre tract.

The sale of the mill was not exactly made to Bryar. The deed was made to James L. Ferson. Bryar & Ferson were going together. At the time of making the sale Ferson had an interest in the mill, and I sold to Ferson with the understanding that Bryar was going into partnership with him. At the time of making the sale I had a two-thirds interest in the mill. I——

Q. What did you sell your interest in that mill for—how much?

A. There was a note I held against another party. I disremember the exact amount. I traded—rather sold it—gave it to Ferson. Ferson bought out another party in the mill—Samuel Brown, I think. I held this note I am speaking of against Samuel Brown's father. Ferson bought out Samuel Brown's interest in the mill.

This note of Samuel Brown's father, that I gave to Ferson—Ferson had that much less to pay Brown for his interest in the mill—and that amount was added to the amount that came to me. The reason of that transaction was, I considered Bryar better than Brown for that amount. The exact amount coming to me at that time, when I made the settlement, I can't tell. I haven't got the "figures." Don't recollect the amount of the Brown note. There was a small book account—my claim against the old firm—which was not included in those notes, by request of Ferson—some three or four hundred dollars—afterwards settled by Ferson—by Ferson & Co. The amount of Brown's note was included in the Bryar note—Bryar & Ferson note.

The whole amount that I sold my interest for, as near as I can recollect, was the amount of these notes, the cash mentioned and the small book account spoken of, which was not included in
37 these notes. The Brown note was, I think, in the neighborhood of $2,000, although I cannot state the exact amount. The Bryar note also included the amount of the Brown note.

Q. State as near as you can the amount of the indebtedness of James Bryar to you, at the time the record was examined with a view to the sale—taking his paper?

A. He didn't owe me anything at the time the record was examined.

Q. State as near as you can the indebtedness of James Bryar to you at the time the sale was consummated.

A. I was to receive $26,717.92 in paper and $5,000 in cash, making a total of $31,717.92.

I received the $5,000 in cash. That left $26,717.92 due from Bryar excepting the book account.

It was to ascertain whether Bryar was worth $26,717.92 that I had this examination made. I didn't know how much property it was reported that Bryar had in his name. He had several pieces so said. I don't know it myself. I couldn't tell you who said so. Can't say that my attorney told me. I don't know that I had an examination made of the different pieces. It was on the strength of the examination made as to the "seven" and "eleven" acres that I took the paper—sold my property and took the paper—being the same property—I suppose so, at least, named in Exhibits "A" and "B." I understand that he had some other property. I had this property—18 acres—examined, which, considering his business here in the city, I considered good enough for my claim. I didn't inquire into the nature and extent of the other property that I heard he owned. I heard the rates of real estate out there—heard that Bryar's property was valuable—had heard it rated at 5, 6, 7, 8 thousand dollars per acre—some above that. I suppose I rated it naturally as other people did.

Q. According then to the way you rated that property the "eleven-acre" tract would be worth between $55,000 and $65,000, would it not?

38 A. It might be and it might not be worth half. I didn't know what property was worth out there. I never lived out here.

Over and above that real estate there he had his business in the city.

Q. Considering then the value of the "eleven-acre tract," his business here in the city, and the other property which you heard he owned, did you not consider James Bryar good for $30,000 at that time?

A. He might be and he might not. I considered him better in having the "seven acres."

At the time he offered the mortgage it was to include the seven-acre piece—I mean the $25,000 mortgage—and no other property. The time that he offered this $25,000 mortgage to me was after the notes had become due.

I agreed to take the $25,000 mortgage on the "seven-acre" tract for the purpose of securing the payment of the paper I held against him, to pay off a mortgage already on the property, and give him some cash. I can't tell how much cash. There was interest due on the mortgage already against the property and interest on my notes, which had to be paid. After paying this interest and the other expenses I was to give him the balance in cash. I did not consider that seven-acre tract good security, at that time, for the $25,000 mortgage I thought it better to take something than nothing. That's what I was aiming at. These negotiations as to the mortgage were before I had obtained judgment. I didn't want to sue Bryar at the time. Bryar wanted more money out of the $25,000 mortgage than I was willing to give him, and the negotiations came to an end. I don't know whether Mrs. Bryar knew anything about the negotiations of this $25,000 mortgage or not. About the time Bryar went into bankruptcy, I bought a mortgage against Bryar from the Dollar savings bank. It was for $10,000—the
39 face of the mortgage. There was some interest on it. It was on the eleven-acre tract. I did not issue an execution on this Bryar judgment.

Q. Did you issue on the mortgage bought by the Dollar savings bank, or the bond accompanying the mortgage?

(Objected to as not cross-examination and immaterial.)

A. I think it was issued on at the time I bought it. I stayed the writ, and issued on it again some time after that, and the property was sold by the sheriff, and bought in by my attorney for me. I took title from the sheriff. It included the "eleven" and not the "seven" acre tract. I believe that Bryar, at the time of the $25,000 mortgage was spoken of, told me he owned the seven-acre tract. I did not get that impression of that from the deed which he gave me. When the mortgage was made out I asked Mr. Rodgers, the attorney, if it was necessary for Mrs. Bryar to sign the mortgage. He asked me if the property was Bryar's. I answered "Yes." He said then it wasn't. At the time of the negotiation of this mortgage there had been some talk of Mrs. Bryar owning this property—the "seven-acre" tract. Can't say who told me, but some one, I think, told me. I asked Bryar if he owned the property. To the best of my knowledge Bryar told me he owned the property. Be-

fore these notes were given for the mill property, I had no personal knowledge of James Bryar further than the examination of his property, and he did not talk to me prior to this time that he owned the seven-acre tract.

Redirect examination:

When he was broke up—James Bryar—it was talked some that Mrs. Bryar owned this "seven-acre" tract. That was what I referred to in my cross-examination. Bryar at this time was broke up—at the time of these rumors. This was some months before he went into bankruptcy.

THOS. CAMPBELL.

Mr. Rodgers offers the record of the judgments against James Bryar at No. 951 and 953, March term, 1875, in the court of
40 common pleas No. 1, Allegheny county, the same being attached to the register's report on *leins*, filed May 8th, 1879, in the United States district court, as No. 2742, in bankruptcy.

By consent THOMAS CAMPBELL, recalled by Mr. McCord, and being examined, says:

The notes spoken of were drawn to the order of James L. Ferson, and indorsed by Ferson. I refer to the original notes. Ferson was on one of the renewals of the original notes. When the second note fell due and the renewal of the balance of the first note—they were put in two renewal notes signed by Bryar and Henry.

THOS. CAMPBELL.

Mr. Rodgers offers the record of the case of James Bryar at No. 2742 in bankruptcy, in the district court of the United States for the western district of Pennsylvania.

Testimony closed.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, S. C. McCandless, special commissioner of the district court of the United States for the western district of Pennsylvania, do hereby certify that the foregoing are the proofs for final hearing in the said case, taken and reduced to writing by Wm. T. Lindsey under my direction; and I do further certify that I am not counsel or attorney for either of the parties in said proof and caption named, nor in any way interested in the event of the cause named in said caption.

Witness my hand this twenty-first day of June, A. D. 1879.

S. C. McCANDLESS,
Special Commissioner.

Fees $21.15.

41 *Decree.*

This cause came on to be heard on the pleadings and evidence, and was argued by counsel for defendants, as well as complainants, and thereupon and upon consideration thereof, the court doth ad-

judge and declare Jane Bryar to be the equitable owner of the land in suit, and that Thomas Campbell received a conveyance thereof and does now hold the same with notice of and subject to the rights of Jane Bryar therein, and it is ordered and decreed that the said Thomas Campbell do by good and sufficient deed or deeds convey to Jane Bryar or to whom she shall appoint the one undivided half part of that tract of land situate in the 21st ward of the city of Pittsburgh, bounded and described as follows: Beginning at a wild-cherry tree, then north fifteen and three-fourths degrees east (N. 15¾° E.) twenty-nine perches (29 p.) to a post, thence south seventy-seven and one-half degrees east (S. 77½° E.) twenty-five and two-tenths perches to a post (25.2 p.), thence south four degrees west (S. 4° W.) forty-nine and four-tenths perches (49.4 p.) to a post, thence north forty-seven degrees west (N. 47° W.) thirty-nine and three-tenths perches (39.3 p.) to the place of beginning, free from all incumbrances done by him or any person or persons claiming by, from or under him, and do account with the said Jane Bryar for all the rents and profits which the said Campbell has or might without willful default received from said land less a just allowance for taxes and repairs on same, and that each party do pay his or her own costs incurred in this proceeding.

PER CURIAM.

42 *Appeal from Decree.*

To the Honorable William McKennan, judge of the circuit court of the United States for the western district of Pennsylvania:

The petition of Thomas Campbell and Robert Arthurs, assignee, respectfully represents.

That on 26th June, 1879, at above No. and term, a decree was entered by the district court of the United States for the western district of Pennsylvania in favor of the plaintiff for the undivided one-half of seven acres of land in city of Pittsburgh, a conveyance of which was asked by the said plaintiff.

That by said decree great injustice was done to defendants the above petitioners.

Petitioners therefore appeal to your honorable court and ask that the pleadings and evidence in said cause be certified to said court in order that the cause may be heard *de novo*; that said decree may be reversed and that your honor may make such order as you may deem meet.

THOMAS CAMPBELL.
ROBERT ARTHURS, *Assignee.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Thomas Campbell, one of above-named defendants and appellants, being duly sworn saith: that above appeal is not taken for purpose of delay, but because he verily believes that the proceedings sought to be removed *as* illegal.

THOMAS CAMPBELL.

Sworn and subscribed before me this 28th day of June, A. D. 1879.

S. C. McCANDLESS,
U. S. Commissioner.

43 *Agreement as to Testimony.*

It is hereby agreed that upon the argument and hearing in the circuit court of the United States on the appeal of the above-stated case, the original testimony taken by the commissioner and the pleadings and papers making up the record now on file in the district court be used for the purpose of the appeal and the making of an exemplification of district court record is hereby waived. It being understood that plaintiff and appellant do not waive any right they may have to object or accept to the action of the circuit court in allowing said appeal to be perfected.

L. C. BARTON,
Solicitor for Plaintiff.
W. B. RODGERS,
Solicitor for Thos. Campbell, Appellant.

Pittsburgh, March 2, 1896.

UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *ss:*

I, William T. Lindsey, clerk of the district court of the United States for the western district of Pennsylvania, do hereby certify that the foregoing papers are the original papers in the case of Jane Bryar by her next friend Robert Bryar against James Bryar and Robert Arthurs at No. 17 May term, 1877, assignee's docket on file in my office in the city of Pittsburgh in said district.

Witness my hand and the seal of said court at the city of Pittsburgh in said district this 18th day of June, A. D. 1896.

[SEAL.] WM. T. LINDSEY, *Clerk.*

Motion and Proposed Order Declaring Appeal Deserted.

And now, December, 1895, it appearing to the court that an appeal was duly allowed from the decree of the district court of the United States for the western district of Pennsylvania made the 26th day of June, A. D. 1879, to this court on the 30th day of August, A. D. 1879, and docketed in this court at the above number and term, and it further appearing that said appellants have failed to bring up the record from the said district court, pay the entry costs in this court or to prosecute their appeal to the next term of this court, it is, on motion of L. C. Barton, solicitor for appellee, decreed that said appeal is hereby declared deserted, and the decree of the said district court is hereby affirmed at costs of appellants.

44 *Notice of Motion to Decree Appeal Deserted, etc.*

You will please take notice that I will, on Thursday, January 2, 1886, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, move the court to decree the above appeal deserted and affirm the decree of the district court.

L. C. BARTON,
Attorney for Plaintiff.

To Thomas Campbell, defendant, or Rodgers & Oliver, Esqs., his attorneys.

Pittsburgh, Dec. 20, 1895.

Answer of Thos. Campbell to Above Application.

To the honorable the judges of said court:

The answer of Thomas Campbell to the rule in above case respectfully represents:

That he became the purchaser of the land described in the proceedings in this case, by purchase at assignee's sale, and was the real party in interest in this appeal. The appeal in this case has not been prosecuted for reasons stated below, namely: After this appeal was taken, through his attorney he purchased a mortgage made by James Bryar to Edward R. James, dated 2d October, 1874, and recorded in Allegheny county, in Mortgage Book, volume 161, page 640, which said mortgage covered the seven acres of land referred to in these proceedings, and upon which mortgage a *lev. fa.* was issued at No. 277 September term, 1879, and the property sold to William B. Rodgers, his attorney, who afterwards conveyed the said land to affiant. By virtue of said *lev. fa.* the affiant claimed to become the owner of the whole of said land freed and discharged from any claim by the petitioner in this case. The affiant about that time went into possession of the said land and at No. 293 March term, 1880, common pleas No. 1, of Allegheny county, the pe-
45 titioner in this case, with her husband, brought an action in ejectment against the affiant's said attorney and affiant's tenant to recover possession of the undivided one-half of said land, and being the same one-half referred to in this proceeding, and claimed to belong to petitioner. The defense in that case was based upon the title of affiant under said sheriff's sale. Upon the trial of the case it was admitted that the money with which said mortgage was purchased was that of affiant, and the plaintiff in that case offered in evidence the record in the case now before this court. Under instructions of the court a verdict was rendered in favor of the defendants and judgment entered thereon and a writ of error taken to the supreme court of Pennsylvania, and judgment affirmed in an opinion filed 14th November, 1881, and reported in 30 Pittsburgh Legal Journal, page 12.

Affiant believes that the result of the case above referred to ob-

viated any necessity for any further proceedings in this court, and ever since the determination of that case, he and his vendees have been in undisputed possession of said land. Affiant for the above reasons did not prosecute the appeal, but if it seems necessary to the court that he should do so he asks the privilege of proceeding and offering testimony in support of the facts as stated in this answer.

THOMAS CAMPBELL.

ALLEGHENY COUNTY, *ss:*

Thomas Campbell, above-named affiant, being duly sworn, says that the facts set forth in the foregoing answer are true and correct.

THOMAS CAMPBELL.

Sworn and subscribed to before me this 31st day of Dec. 1895.

J. RODGERS McCREERY,
Notary Public.

46 *Order of Court.*

And now, 28th January, 1896, on due consideration it is ordered that the motion to dismiss the appeal be denied and it is further ordered that the appellant have leave to perfect the appeal and to take further testimony.

BY THE COURT.

Order Substituting Plaintiffs.

And now January 27th, 1896, the death of Jane Bryar plaintiff and appellee in the within-stated case being suggested, on motion, — is ordered that James Bryar, Jr., Emma S. Bryar, Samuel B. Bryar, Edward S. Bryar, Jennie H. Bryar, Hattie S. Bryar, Susan Bryar heirs-at-law of said Jane Bryar, be substituted as plaintiffs and appellees in said case.

BY THE COURT.

Petition to Revoke Order of Jan. 28, 1896.

To the honorable the judges of said court:

The petition of Emma S. Bryar, Samuel B. Bryar, Edward Bryar, Hattie Bryar, Jennie Bryar, Susan Bryar and James Bryar, Jr., respectfully represents:

That they are the sole heirs-at-law of Jane Bryar, said *said* plaintiff who died August 28, 1890.

That on the 28th day of January, 1896, your honorable court made an order allowing Thomas Campbell, one of said defendants, to take additional testimony upon the appeal in the above-stated case. Your petitioners aver that they have not had their day in court to which they are legally entitled to be heard before the making of said order, or was a rule granted to show cause why said order should not be made.

Your petitioners further aver that the paper presented to the

court by the attorney of said Thos. Campbell, alleging to be
47 our answer filed to some rule never granted by your honorable court misleads the court. The testimony proposed to be taken by appellees is not after-discovered evidence or such as they were not cognizant of at the time of closing their testimony in the court below but the facts intended to be proven happened long prior to the closing of the testimony in the court below. In this case Thomas Campbell became a party defendant upon his own motion upon the 15th day of August, 1878, and that the mortgage upon which Campbell claims title in said alleged answer was assigned to said Campbell through William B. Rodgers, Esq., his attorney and agent upon the 7th day of June, 1878, and before Campbell became a party defendant in this case and that upon the 30th day of March, A. D. 1878, *scire facias* on said mortgage was issued to No. 204, June term, 1878, upon which judgment was obtained April 12th, 1878, and on the same a *scire facias* was issued on the 15th day of April, 1878, to No. 195, June term, 1878, which said writ was on the 3rd day of June, 1878, stayed costs paid by W. B. Rodgers, Esq., and that on the 15th day of August, 1879, an alias *levari facias* was issued to No. 277 September term, 1879, all the above writs being in the court of common pleas No. 1, of Allegheny county, Pa., upon which said writ the property described in said mortgage was sold on the 6th day of September, 1879, to W. B. Rodgers, Esq., agent and attorney for said Thos. Campbell, and a deed was duly acknowledged by Thos. H. Hunter, Esq., sheriff of said county, on the 20th September, 1879, and delivered to said Rodgers.

The testimony before S. C. McCandless, Esq., commissioner in the court below was closed June 21st, 1879, and the decree made June 26th, 1879.

Your petitioners therefore avering that said testimony is not after-discovered evidence but such as appellees were cognizant of
48 before the closing of their testimony, they ask your honorable court to strike out that portion of said order of June 28th, as allows appellees to take additional testimony and they will ever pray, etc.

EMMA S. BRYAR,
SAMUEL B. BRYAR,
EDWARD BRYAR,
HATTIE BRYAR,
JENNIE BRYAR,
SUSAN BRYAR,
By L. C. BARTON,
Their Attorney.
JAMES BRYAR, JR.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *sct:*

James Bryar, Jr., appears, makes oath and says that he is one of the heirs-at-law of Jane Bryar, dec'd, and agent in their behalf for

the other heirs set out in petition attached, and that the matters set forth in said petition are true and correct as he verily believes.

JAS. BRYAR, JR.

Sworn and subscribed before me this 29th day of January, A. D. 1876.

THOS. J. PARKINSON, *Alderman.*

Testimony

Taken before S. C. McCandless, an examiner of the United States circuit court in and for said district, at his office, No. 110 Diamond street.

PITTSBURGH, *February* 29, 1896.

Solicitors present, W. B. Rodgers, Esq., for Thomas Campbell, appellant, and L. C. Barton, Esq., for appellee.

Mr. Rodgers offers the first mortgage of James Bryar to Edward R. James, dated October 7, 1874, recorded in Mortgage Book, vol. 161, page 640.

It is agreed by and between the said solicitors, that the above-mentioned mortgage covers the real estate in controversy in this case.

Mr. Rodgers offers *sci. fa.* on the said mortgage at No. 204,
49 June term, 1878, court of common pleas No. 1, of Allegheny county, Pennsylvania, judgment at No. 12, April term, 1878, and *lev. fa.* on above judgment at No. 195, June term, 1878, and stayed; also *alias lev. fa.* at No. 277 September term 1879 and premises sold to W. B. Rodgers; also sheriff's deed under the above-mentioned *lev. fa.*, Thomas H. Hunter, sheriff, to W. B. Rodgers acknowledged 20th of September, 1879, recorded in Sheriff's Deed Book, vol. 3, page 604.

Mr. Barton objects to all the above testimony as incompetent and irrelevant and as being evidence of which the appellant was cognizant of before the closing of the testimony and the entry of the decree in the district court.

Appellant (by Mr. Rodgers) now offers the record in the court of common pleas of Allegheny county, James Bryar and Jane Bryar his wife, in right of said Jane Bryar, *vs.* John W. Beckett, William B. Rodgers and Thomas Campbell, ejectment, 1st Monday of February, 1880, for the land in controversy in this case, showing May 19, 1881, verdict for the defendants, and June 22, 1881, writ of error to No. 184, October and November term, 1881, supreme court of Pennsylvania, and November 14th, 1881, judgment affirmed, and, in the same connection, offers the opinion of the supreme court reported in 30 Legal Journal, page 12.

Mr. Barton, for appellee, makes the same objection, as before stated to the foregoing.

It is agreed between counsel, that, instead of the exemplification of the above records, there may be used in this case the paper books on both sides in the above-mentioned case and that for the abstracts

of title, the testimony, the points and all matters relevant to this issue, reference may be had to said paper books.

It is also agreed that William B. Rodgers purchased the property referred to in the above proceeding (being the property in dispute) for Thomas Campbell and afterwards made a deed to him.

50 The previous objections made by Mr. Barton, renewed by him to apply to the foregoing testimony.

UNITED STATES OF AMERICA, *Western District of Pennsylvania*, } *ss:*

I, S. C. McCandless, an examiner of the circuit court of the United States for the said district, do hereby certify that the foregoing testimony, in the case stated in the caption thereto, was taken by me at the place and time therein mentioned; and I do further certify that I am not attorney or counsel for any of the parties named in said caption or in any way interested in the event of said suit.

Witness my hand, at Pittsburgh, this 29th day of February, A. D. 1896.

S. C. McCANDLESS, *Examiner.*

Fees, $4.00.

Docket Entries Referred to in Testimony, Page 59.

EDWARD R. JAMES *vs.* JAMES BRYAR, with Notice to Robert Arthurs, His Assignee in Bankruptcy. } No. 204, June Term, 1878.

Sci. fa. surmortgage, recorded in vol. 161, page 640, to first Monday in April, 1878. Affidavit filed for $2,000, interest from April 1st, 1876, and attorneys' commissions served April 1st, 1878. April 12th, 1878, judgment against defendant in default, *sec. reg.* for two thousand, three hundred and fifty-five dollars and eighty-one cents ($2,355.81). And now, August 30, 1879, petition of Jane Bryar, by her next friend Robert Bryar, presented in open court, and rule granted to show cause why said petitioner should not be permitted to pay into court the equal half of said two judgments, debt, interest and costs, and upon so doing have the one-half of said

51 judgment debt, interest and costs marked for the use of the said Jane Bryar, or for such person or persons as she may appoint, to be held for the use and benefit of the said Jane Bryar, returnable Wednesday next (September 3), at 10 o'clock a. m., and in the meantime all proceedings against the interest in said land claimed by Jane Bryar stayed.

BY THE COURT.

September 6, 1879, on argument list, and rule discharged.

THOS. MCCLINTOCK *vs.* JAMES BRYAR, with Notice to Robert Arthurs, His Assignee in Bankruptcy.	No. 205, June Term, 1878.

Scia. fa. surmortgage recorded in vol. 161, page 637, to first Monday in April, 1878. Affidavit filed for $3,000, interest from April 1st, 1876, and attorneys' commissions, served April 1st, 1878. April 12th, 1878, judgment against defendant in default *sec. reg.* for three thousand five hundred and thirty-three dollars and seventy-five cents ($3,533.75). August 30th, 1879, same order of court as entered of this date at No. 204, June term, 1878. September 6th, 1879, on argument list, and rule discharged.

Opinion and Decree.

JANE BRYAR ET AL. *vs.* JAMES BRYAR, Bankrupt; THOMAS Campbell, *et al.*	No. 30, November Term, 1879. In Equity.

Appeal from the district court of the United States for the western district of Pennsylvania.

Coram Acheson and Buffington, JJ.

ACHESON, *Circuit Judge:*

Pending this appeal, in the year 1880, Jane Bryar brought an action of ejectment in the court of common pleas, No. 1, of
52 Allegheny county, Pennsylvania, against Thomas Campbell and others, to recover the land here in controversy. That case was tried before a jury and a verdict rendered in favor of the defendants in the action. Judgment upon the verdict having been entered, Mrs. Bryar sued out a writ of error, and, after argument, the supreme court of Pennsylvania, affirmed the judgment of the court of common pleas. (30 *Pittsburgh Legal Journal*, 12.) In that ejectment Mrs. Bryar set up against Thomas Campbell, as the basis of her right to recover, the same equitable title, which was the foundation of her bill in equity in the United States district court and which her heirs now assert against Campbell in this court. These facts, which have been brought upon the record by proofs and a written stipulation, are decisive, we think, against the heirs of Jane Bryar, the now appellees. Mrs. Bryar elected to have her rights determined in the State courts, and Campbell was compelled to defend in the State forum. Whether or not Campbell could have set up the pendency of the bill here in abatement or bar of the action in the court of common pleas we need not inquire. It is enough that he did not attempt to do so, and the action proceeded in the State courts upon the merits to final judgment. As an adverse decision there against Campbell would have concluded him, so the decision in his favor concluded Mrs. Bryar and her heirs.

The ejectment brought by Mrs. Bryar was upon her equitable title, a procedure allowable in the courts of Pennsylvania, where an equitable ejectment is the full equivalent of and substitute for a bill in equity: and it is well settled that in ejectment upon an equitable title one verdict and judgment are conclusive of the title. *Peterman vs. Huling*, 31 Pa., 432; *Winpenny vs. Winpenny*, 92 Pa., 440. This being an established rule of property in Pennsylvania, an equally conclusive effect is to be given to such a verdict and judgment in the courts of the United States. *Miles vs. Caldwell*, 2 Wall., 36. A complete defence to this bill is therefore shown, and
53 that defence is available here under the present pleadings supplemented by the stipulation of counsel.

Buffington, J., concurs.

Decree.

This cause having come on for final hearing upon the proofs, pleadings and a written stipulation was argued by counsel. And now, February 5th, 1897, upon consideration the decree of the district court is reversed, the costs in that court, however, to be paid by Thomas Campbell, and it is further ordered, adjudged and decreed that the bill of complaint be and the same is dismissed (without costs in this court).

BY THE COURT.

Petition on Appeal.

To the honorable United States circuit court of appeals for the third circuit:

The appeal of the above-named complainant respectfully shows:

The above-named complainants conceiving themselves aggrieved by the order of court made on the 28th day of January, A. D. 1896, as well as by the final decree entered in the above-entitled cause, does hereby appeal therefrom to the United States circuit court of appeals for the third circuit, and it prays that its appeal may be allowed and a citation directed to the above-named defendants, commanding them to appear before the United States circuit court of appeals for the third circuit to do and receive what may pertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said cause duly authenticated may be sent to the United States circuit court of appeals for the third circuit, and that the said order and decree
54 of the circuit court may be modified or such decree made as to the circuit court of appeals shall seem meet.

L. C. BARTON,
Att'y for Complainant.

And now, August 9th, 1896, a rule is granted upon the defendants to show cause why the appeal prayed for should not be allowed as of August 5th, 1897.

M. W. ACHESON,
Circuit Judge.

And now, February 8th, 1897, the above rule is made absolute and the appeal is allowed as of August 5th, 1897, it appearing that this court was not in session on that day and no judge of the court was at chambers. The counsel for the appellants filed his assignments of error with the clerk, and in office of the clerk, on August 5th, 1897, but no judge was within reasonable reach to enable — to perfect the appeal.

M. W. ACHESON,
U. S. Circuit Judge.

Assignments of Error.

And now August 5, 1897, comes appellants by counsel and file the following assignments of error:

1. The court below erred in not allowing the motion of appellee and order thereon of January 28th, 1896, to wit:

"And now December —, 1895, it appearing to the court that an appeal was duly allowed from the decree of the district court of the United States for the western district of Pennsylvania, made the 26th day of June A. D. 1879, to this court on the 30th day of August A. D. 1879, and docketed in this court at the above number and term, and it further appearing that said appellants have failed to bring up the record from the said district court, pay the entry costs in this court or to prosecute their appeal to the next term of this court. It is on motion of L. C. Barton, solicitor for appellee decreed that said appeal is hereby declared deserted, and the decree of the said district court is hereby affirmed at costs of appellants."

55 II. The court below erred in making the order of 28th January, 1896, to wit:

"And now 28th January, 1896, on due consideration it is ordered, that the motion to dismiss the appeal be denied and it is further ordered that the appellant have leave to perfect the appeal and to take further testimony.

BY THE COURT."

III. The court below erred in making the decree of February 5th, 1897, to wit:

"This cause having come on for hearing upon the proofs, pleadings and written stipulation, was argued by counsel. And now February 5, 1897, upon consideration the decree of the district court reversed the costs of that court, however, to be paid by Thomas Campbell. And it is further ordered, adjudged and decreed that the bill of complaint be and the same is dismissed without costs in this court.

BY THE COURT."

L. C. BARTON,
Attorney for Appellants.

Bond.

Know all men by these presents that we, James Bryar, Jr., Emma S., Samuel B., Edward S., Jennie H., Hattie S. and Susan Bryar, principals, Peter McGovern, surety, are held and firmly bound unto Thomas Campbell in the sum of five hundred dollars to be paid to the said Thomas Campbell, his certain attorneys, heirs, executors, administrators or assigns, to which payment well and truly to be made, we do bind ourselves, our heirs, executors and administrators, and every of them jointly and severally, firmly by these presents.

Witness our hands and seals the 5th day of August, in the year of our Lord one thousand eight hundred and ninety-seven.

Now, the condition of the above obligation is such, that
56 whereas, in a certain action pending in the United States circuit court for the third circuit, sitting in the western district of Pennsylvania, as No. 30, November term, 1879, in equity, wherein Jane Bryar, by her next friend, is appellee, and James Bryar *et al.*, appellants, and the principals to this bond having taken an appeal from the decree of said court in said case to the United States circuit court of appeals for the third circuit:

Now, if said appellants shall prosecute their said appeal with effect and pay all costs that may be adjudged against them without any fraud or further delay, then this obligation to be void, otherwise to be and remain in full force and virtue.

JAMES BRYAR, JR. [SEAL.]
EMMA S.,
SAMUEL B.,
EDWARD S.,
JENNIE H.,
HATTIE S., AND
SUSAN BRYAR,
By L. C. BARTON, [SEAL.]
Their Attorney.
PETER McGOVERN. [SEAL.]

Sealed and delivered in the presence of—
THOS. J. PARKINSON.

And now, February 8, 1898, the within bond approved as of August 5th, 1897. See order on back for petition for appeal for reasons for this allowance.

M. W. ACHESON,
U. S. Circuit Judge.

Citation.

UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *ss:*

To Thomas Campbell, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, to be holden at Philadelphia,

Penna., on the 9th day of March next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the western district of Pennsylvania, wherein James Bryar, Jr., Samuel B. Bryar, Edward Bryar, Hattie Bryar, Jennie Bryar, and Susan Bryar, are appellants and you are appellee, to show cause, if
56½ any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this eighth day of February, A. D. 1898.

M. W. ACHESON,
U. S. Circuit Judge.

Served upon W. B. Rogers, Esq., attorney for Thomas Campbell, February 26th, 1898.

H. D. GAMBLE, *Clerk.*

Certificate.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

In the Circuit Court of the United States for the Western District of Pennsylvania.

JAMES BRYAR ET AL.
vs.
THOMAS CAMPBELL. } No. 30. Nov. Term, 1879.

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 5th day of March, A. D. 1898.

[SEAL.] H. D. GAMBLE, *Clerk.*

57 And afterwards, to wit, on the twelfth day of October, A. D. 1898, this cause being called for argument on the transcript of record from the circuit court of the United States for the western district of Pennsylvania, before Hon. George M. Dallas, circuit judge, and Hon. William Butler, district *and* judge, and Hon. Andrew Kirkpatrick, district judge, and being argued by counsel for the respective parties, and the court, not being fully advised in the premises, takes further time for consideration thereof.

And afterwards, to wit, on the fifth day of December, A. D. 1898, comes the parties aforesaid, by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinion, to wit:

57½ In the United States Circuit Court of Appeals for the Third Circuit.

JAMES BRYAR, JR., ET AL., Heirs of Jane Bryar, Deceased, Appellant-,
vs.
THOMAS CAMPBELL.

Appeal from the circuit court of the United States for the western district of Pennsylvania.

Before Dallas, Butler, and Kirkpatrick, JJ.

BUTLER, *District Judge:*

In January, 1877, James Bryar was declared a bankrupt, and soon thereafter certain land to which he had title was offered for sale by his assignee. His wife, Jane Bryar, thereupon petitioned the district court for an order to restrain the sale, averring that the property was hers, the deed for the same having been made to her husband by mistake. While the application was pending the assignee sold the land to Campbell. Subsequently (June 29, '78) Campbell was brought in as a defendant, and later (June, '79) the petition was amended by inserting a prayer for conveyance of the land by Campbell to the petitioner. Thus the proceeding became substantially a suit between Mrs. Bryar and Campbell for the property in controversy. Subsequently the court adjudged it to her and decreed that Campbell convey accordingly. July 16, '79, the latter appealed to the circuit court. While the appeal was pending the land was sold under a mortgage executed by James Bryar October 2, 1874, and purchased by William Rogers, who conveyed to Campbell. In 1880 Mrs. Bryar brought an action of ejectment against Campbell, and on the trial a verdict was rendered against her and judgment entered accordingly. January 28, 1896, the plaintiff moved the court to dismiss the appeal (for imperfection); which motion the court refused. With these facts appearing on the record the
58 appeal came to a hearing in 1897 and the bill was dismissed. The refusal to strike off the appeal and the dismissal of the bill constitute the errors assigned.

The case is extraordinary; but in any view that can be taken of it the action of the circuit court (in both respects complained of) must be affirmed. Granting that the district court had jurisdiction to enter the decree (which may well be doubted, to say the least), and that the circuit court had authority to do more than reverse and dismiss the bill, for want of such jurisdiction, its refusal of the motion and dismissal of the bill on the merits must be affirmed, because, first, the suit at law must be treated as an abandonment of the proceeding in equity, and, second (if not), the verdict of the jury must be regarded as a conclusive finding of the facts, on which the plaintiff's case rests, against her.

The decree is therefore affirmed.

59 United States Circuit Court of Appeals for the Third Circuit.

JAMES BRYAR, JR., EMMA S. BRYAR, SAMUEL B. BRYAR, EDWARD S. Bryar, Jennie H. Bryar, Hattie S. Bryar, and Susan Bryar, Heirs-at-law of Jane Bryar, Deceased, Appellants,
vs.
THOMAS CAMPBELL.

Appeal from the circuit court of the United States for the western district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the western district of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

WM. BUTLER, *J.*

Philadelphia, December 6, 1898.

60 In the United States Circuit Court of Appeals, Third Circuit.

JAMES BRYAR, JR., ET AL., Appellants,
vs.
THOMAS CAMPBELL.

To the honorable the judges of said court:

The appeal of James Bryar, Jr., Emma S. Bryar, Samuel B. Bryar, Edward S. Bryar, Jennie H. Bryar, Hattie S. Bryar, and Susan Bryar, heirs-at-law of Jane Bryar, deceased, respectfully shows—

That above-named complainants, conceiving themselves aggrieved by the order of this court made the 5th day of December, A. D. 1898, does hereby appeal therefrom to the Supreme Court of the United States, and aver that the cause was an action arising under the bankrupt laws of the United States of 1867 and supplements, and that the value of the property in controversy exceeds one thousand dollars, and that said United States circuit court of appeals, third circuit, erred as follows:

1st. In finding as a fact as follows: "Subsequently (June 29, '78) Campbell was brought in as a defendant."

2d. In the first conclusion of law as follows: "First, the suit at law must be treated as an abandonment of the proceeding in equity."

3rd. In the second conclusion of law as follows: "Second (if not), the verdict of the jury must be regarded as a conclusive finding of the facts on which plaintiff's case rests against her."

61 4th. The court erred in affirming motion and order of the circuit court of January 28th, 1896, to wit: "And now, December —, 1895, it appearing to the court that an appeal was duly allowed from the decree of the district court of the United States for the western district of Pennsylvania, made the 26th day of June, A. D. 1879, to this court on the 30th day of August, A. D. 1879, and docketed in this court at the above number and term, and it

further appearing that said appellants have failed to bring up the record from the said district court, pay the entry costs in this court, or to prosecute their appeal to the next term of this court, it is, on motion of L. C. Barton, solicitor for appellee, decreed that said appeal is hereby declared deserted, and the decree of the said district court is hereby affirmed at costs of appellants."

5th. The court erred in affirming circuit court in making order of 28th January, 1896, to wit: "And now, 28th January, 1896, on due consideration, it is ordered that the motion to dismiss the appeal be denied; and it is further ordered that the appellant have leave to perfect the appeal and to take further testimony."

6th. The court erred in affirming decree of the circuit court of February 5th, 1897, to wit: "This cause, having come on for final hearing upon the proofs, pleadings, and written stipulation, was argued by counsel; and now, February 5th, 1897, upon consideration, the decree of the district court — reversed, the costs of that court, however, to be paid by Thomas Campbell; and it is further ordered, adjudged, and decreed that the bill of complaint be, and the same is, dismissed, without costs in this court."

7th. The court erred in not affirming decree of the district
62 court filed June 26th, 1879, to wit: "This cause came on to be heard on the pleadings and evidence, and was argued by counsel for defendants, as well as for complainant; and thereupon and upon consideration thereof the court doth adjudge and declare Jane Bryar to be the equitable owner of the land in suit, and that Thos. Campbell received a conveyance thereof and does now hold the same with notice of and subject to the rights of Jane Bryar therein; and it is ordered and decreed that the said Thos. Campbell do, by good and sufficient deed or deeds, convey to Jane Bryar, or to whom she shall appoint, the one undivided half part of that tract of land, situate in the 21st ward of the city of Pittsburg, bounded and described as follows: Beginning at a wild-cherry tree, thence north fifteen and three-quarters degrees east (N. 15¾ E.) twenty-nine perches (29 p.) to a post; thence south seventy-seven and one-half degrees east (S. 77½ E.) twenty-five and two-tenths perches to a post ($25\frac{2}{10}$ p.); thence south four degrees west (S. 4 W.) forty-nine and four-tenths perches ($49\frac{4}{10}$ p.) to a post; thence north forty-seven degrees west (N. 47 W.) thirty-nine and three-tenth-perches ($39\frac{3}{10}$ p.) to the place of beginning, free from all incumbrances done by him or any person or persons claiming by, from, or under him, and do account with the said Jane Bryar for all the rents and profits which the said Thomas Campbell has or might, without wilful default, have received from said land, less a just allowance for taxes and repairs on same, and that each party do pay his or her own costs incurred in this proceeding."

8th. The court erred in doubting the jurisdiction of the district court as follows: "Granting that the district court had jurisdiction to enter the decree (which may well be doubted, to say the least), and that the circuit court had authority to do more than re-
63 verse and dismiss the bill for want of such jurisdiction."

And they therefore pray that their appeal may be allowed,

and a citation directed to the above-named appellee and defendant, commanding him to appear before the Supreme Court of the United States to do and receive what may pertain to justice to be done in the premises, and that a transcript of the record, proceedings, and evidence in said cause, duly authenticated, may be sent to the Supreme Court of the United States, and that the said order or decree of the said United States circuit court of appeals, third circuit, may be modified or such order or decree made as to the said Supreme Court of the United States shall seem meet.

L. C. BARTON,
Of Solicitor for Appellants.

And now, January 20th, 1899, the within appeal allowed.

GEORGE SHIRAS, JR.,
Associate Justice, Supreme Court of the United States.

(Endorsed:) No. 24. September term, 1898, U. S. circuit court of appeals, third circuit. James Bryar, Jr., *et al.*, appellants, *vs.* Thomas Campbell. Petition on appeal. Edward Campbell, L. C. Barton. Filed January 25th, 1899.

64 In the Supreme Court of the United States.

JAMES BRYAR, JR., ET AL., Appellants,
vs.
THOMAS CAMPBELL.

And now, January 20th, 1899, come appellants, by counsel, and file the following assignments of error to the United States circuit court of appeals, third circuit:

1st. The court erred in finding as a fact as follows: "Subsequently (June 29, '78) Campbell was brought in as a defendant."

2d. The court erred in the first conclusion of law as follows: "First, the suit at law must be treated as an abandonment of the proceeding in equity."

3rd. The court erred in the second conclusion of law as follows: "Second (if not), the verdict of the jury must be regarded as a conclusive finding of the facts, on which plaintiff's case rests, against her."

4th. The court erred in affirming motion and order of the circuit court of January 28th, 1896, to wit: "And now, December —, 1895, it appearing to the court that an appeal was duly allowed from the decree of the district court of the United States for the western district of Pennsylvania made the 26th day of June, A. D. 1897, to this court on the 30th day of August, A. D. 1897, and docketed in this court at the above number and term, and it further appearing that said appellants have failed to bring up the record from the said district court, pay the entry costs in this court, or to prosecute their appeal to the next term of this court, it is, on motion of L. C. Barton, solicitor for appellee, decreed that said appeal is
65 hereby declared deserted and the decree of the said district court is hereby affirmed at costs of appellants."

5th. The court erred in affirming — circuit court in making order of 28th January, 1896, to wit: "And now, 28th January, 1896, on due consideration, it is ordered that the motion to dismiss the appeal be denied; and it is further ordered that the appellant have leave to perfect the appeal and to take further testimony."

6th. The court erred in affirming decree of the circuit court of February 5th, 1897, to wit: "This cause, having come on for final hearing upon the proofs, pleadings, and written stipulation, was argued by counsel; and now, February 5th, 1897, upon consideration, the decree of the district court — reversed; the costs of that court, however, to be paid by Thomas Campbell; and it is further ordered, adjudged, and decreed that the bill of complaint be, and the same is, dismissed without costs in this court."

7th. The court erred in not affirming decree of the district court filed June 26th, 1897, to wit: "This cause came on to be heard on the pleadings and evidence and was argued by counsel for defendants as well as for complainant; and thereupon and upon consideration thereof the court doth adjudge and declare Jane Bryar to be the equitable owner of the land in suit, and that Thos. Campbell received a conveyance thereof and does now hold the same, with notice of and subject to the rights of Jane Bryar therein; and it is ordered and decreed that the said Thos. Campbell do by good and sufficient deed or deeds convey to Jane Bryar or to whom she shall appoint the one undivided half part of that tract of land situate in the 21st ward of the city of Pittsburg, bounded and described as follows: Beginning at a wild-cherry tree, thence north fifteen and three-quarters degrees east (N. $15\frac{3}{4}$ E.) twenty-nine perches
66 (29 p.) to a post; thence south seventy-seven and one-half degrees east (S. $77\frac{1}{2}$ E.) twenty-five and two-tenths perches to a post ($25\frac{2}{10}$ p.); thence south four degrees west (S. 4 W.) forty-nine and four-tenths perches ($49\frac{4}{10}$ p.) to a post; thence north forty-seven degrees west (N. 47 W.) thirty-nine and three tenths perches ($39\frac{3}{10}$ p.) to the place of beginning, free from all incumbrances done by him or any person or persons claiming by, from, or under him, and do account with the said Jane Bryar for all the rents and profits which the said Thomas Campbell has or might without willful default have received from said land, less a just allowance for taxes and repairs on same, and that each party do pay his or her own costs incurred in this proceeding."

8th. The court erred in doubting the jurisdiction of the district court as follows: "Granting that the district court had jurisdiction to enter the decree (which may well be doubted, to say the least), and that the circuit court had authority to do more than reverse and dismiss the bill for want of jurisdiction."

L. C. BARTON,
Of Solicitors for Appellants.

Endorsed: No. —. — term, 1899, Supreme Court of the United States. James Bryar, Jr., *et al.*, appellants, *vs.* Thomas Campbell. Assignments of error. Edward Campbell, L. C. Barton. Filed in circuit court of appeals for the third circuit January 25th, 1899.

67 Know all men by these presents that we, James Bryar, Jr., Edward S. Bryar, Samuel Bryar, Emma S. Bryar, Hattie Bryar, Jennie H. Bryar, and Susan Bryar, as principal-, and Peter McGovern and S. J. McFarren, both of Pittsburgh, Allegheny county, Penna., as sureties, are held and firmly bound unto Thomas Campbell in the full and just sum of five hundred (500) dollars, to be paid to the said Thomas Campbell, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a United States circuit court of appeals, third circuit, in a suit depending in said court between James Bryar, Jr., *et al.*, the principals hereto, as appellants, and Thomas Campbell, as appellee, a decree was rendered against the said James Bryar, Jr., *et al.*, and the said James Bryar, Jr., *et al.* having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Thomas Campbell, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said James Bryar, Jr., *et al.* shall prosecute their appeal to effect
68 and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JAS. BRYAR, JR., [SEAL.]
For Himself and Attorney for Edward S., Samuel B., Emma S., Hattie S., Jennie H., and Susan Bryar.
PETER McGOVERN. [SEAL.]
S. J. McFARREN. [SEAL.]

Sealed and delivered in presence of—

L. C. BARTON, As to all.
H. D. GAMBLE,
As to sureties.

Approved by—

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *sct:*

Peter McGovern and S. J. McFarren, the sureties on the within bond, appear, make oath, and say that they are each freeholders within the western district of Pennsylvania, and are respectively

worth double the amount of the within bond over and above their just debts and liabilities.

PETER McGOVERN.
S. J. McFARREN.

Sworn and subscribed *coram* this 14th day of January, A. D. 1899.

H. D. GAMBLE,
[SEAL.] *U. S. Commissioner.*

(Endorsed:) No. 24. Sept. term, 1898, U. S. circuit court of appeals, third circuit. James Bryar, Jr., *et al.*, appellants, *vs.* Thos. Campbell. Bond on appeal to U. S. Supreme Court. Edward Campbell, L. C. Barton. Filed January 25, 1899.

69 UNITED STATES OF AMERICA, *ss:*

To Thomas Campbell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the United States circuit court of appeals for the third circuit, wherein James Bryar, Jr., Emma S. Bryar, Samuel B. Bryar, Edward S. Bryar, Jennie H. Bryar, Hattie S. Bryar, and Susan Bryar, heirs-at-law of Jane Bryar, deceased, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 20th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) No. 24. Sept. term, 1898, U. S. circuit court of appeals, third circuit. James Bryar, Jr., *et al.*, appellants, *v.* Thos. Campbell. Citation. Service of the within citation accepted this 23d day of January, A. D. 1899. W. B. Rodgers, attorney for Thos. Campbell, appellee. Edward Campbell, L. C. Barton. Filed January 25, 1899.

70 UNITED STATES OF AMERICA, *ss:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, do hereby certify that the foregoing pages from one to seventy, inclusive, to contain a full, true, complete, and faithful copy of the original transcript of record in the case of James Bryar, Jr., Emma S. Bryar, Samuel B. Bryar, Edward S. Bryar, Jennie H. Bryar, Hattie S. Bryar, and Susan Bryar, heirs-

at-law of Jane Bryar, deceased, appellants, *vs.* Thomas Campbell, appellee, No. 24, September term, 1898, on file and now remaining among the records of the said court in my office.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this thirty-first day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No., 17,317. U. S. C. C. of appeals, 3rd circuit. Term No., 227. James Bryar, Jr., Emma S. Bryar, Samuel B. Bryar, Edward S. Bryar, Jennie H. Bryar, Hattie S. Bryar, and Susan Bryar, heirs-at-law of Jane Bryar, deceased, appellants, *vs.* Thomas Campbell. Filed March 6th, 1899.

Filed Dec. 29, 1902.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 231.

JAMES BRYAN, JR., EMMA T. BRYAN, SAMUEL H. BRYAN, EDGAR S. BRYAN, JESSIE T. BRYAN, NETTIE T. BRYAN, and SUSAN BRYAN, Heirs-at-Law of Jane Bryan, Deceased,

Plaintiffs,

vs.

THOMAS CAMPBELL,

Defendant.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

EDWARD CAMPBELL,
LOWRIE C. BARTON,
Counsellors for Appellant.

(17,317.)

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IN THE

Supreme Court of the United States,

No. 227 OCTOBER TERM, 1899.

JAMES BRYAR, JR. *et al.*, HEIRS OF JANE BRYAR, deceased, APPELLANTS,

VERSUS

THOMAS CAMPBELL, APPELLEE.

BRIEF EX-PARTE APPELLANTS.

HISTORY OF THE CASE.

In the year 1837 James McElroy died intestate, leaving as his heirs seven children, to wit: S. B., John, James, Eliza, Susan, Mary and Jane. At No. 46 June Term, 1850, Orphans' Court of Allegheny county, Pa., partition was had of the real estate of said decedent, and the same was by the inquest divided into seven purparts and valued as then directed by law. The lot in dispute, being purpart No. 6, containing seven acres, was chosen by John McElroy, and allotted to him by the court. S. B. McElroy chose purpart No. 1; Eliza, No. 2; Mary, No. 3; James, No. 7. Purparts Nos. 4 and 5 were not taken at valuation and ordered to be sold. On the settlement of the estate in partition there was due and owing to Jane McElroy (afterwards Jane Bryar) the sum of $2,528.73, which was to be paid by Samuel B. McElroy. For this sum said S. B. McElroy paid his sister, Jane, $952.02 cash, and assigned to her a note of their sister, Eliza, date March 18th, 1852, to his order, payable on demand for $1,576.71, with

interest; said payment being made and note assigned on March 23d, 1852. Some months after this Jane McElroy married James Bryar.

On the 10th day of June, 1856, John McElroy conveyed said purpart No. 6 (the seven acres in dispute) to S. B. McElroy and James Bryar, their heirs and assigns. There was a dwelling house on the property at date of partition and conveyance by John. In the year 1857 James Bryar, with his wife, moved on said premises and made improvements and, perhaps, additions. About the 17th of March, 1863, S. B. McElroy agreed with his sister, Jane Bryar, that as their sister Eliza was not able to pay said note held by Jane, and as he considered himself liable therefor, he, in consideration of the surrender of said note, would convey to her the undivided one-half of said purpart No. 6 (the seven acres in dispute), held by him as tenant in common with James Bryar. Said Jane Bryar sent said note by her husband to S. B. McElroy, and he and his wife executed a deed for his half of the property, as he thought, to his sister Jane, but through a mistake or other cause the deed was made to James Bryar. There was due on this note to Jane Bryar, at date of surrender, over $2,500. The only money ever received on this note by Jane Bryar was the first year's interest. A year or so after the execution of the deed by S. B. McElroy and wife for his half of the seven acres, James Bryar informed his wife that the deed was to him, and that it was recorded. She told her husband repeatedly that she wanted it changed to her, but he told her it was perfectly safe. The mistake was never corrected. James Bryar and Jane, his wife, continued in actual possession of the premises (the seven acres in dispute) from the year 1857 to the month of September, 1878, when they were dispossessed by an order of the United States District Court for the Western District of Pennsylvania, ex-

pressing that it is without prejudice to Mrs. Bryar's title, made at No. 2742, in Bankruptcy Estate of James Bryar. Appendix, page 35

On the 1st day of October, 1874, James Bryar, without the knowledge or consent of Jane Bryar, his wife, executed two mortgages on said seven acres, one to Thomas McClintock for $3,000, and one to Ed. R. James for $2,000, both being recorded October 2, 1874, in the Recorder's office of Allegheny county, in Mortgage Book, vol. 161, pages 637, 638, 639 and 640.

On the 8th day of January, 1877, James Bryar was adjudged a bankrupt on the petition of his creditors, at No. 2742 in Bankruptcy, District Court of the United States for the Western District of Pennsylvania, and on the 8th day of February, 1877, Robert Arthurs was chosen assignee of his estate, and the property of said bankrupt duly conveyed to him according to law. The said assignee being about to sell said seven acres as the property of James Bryar, bankrupt, when the said Jane Bryar, by her next friend, Robert Bryar, on the 30th of April, 1877, filed her bill of complaint against said James Bryar and Robert Arthurs, his assignee, asking the court, among other things, to restrain said assignee from exercising control or jurisdiction over her interest in said seven acres, said bill of complaint being the case at bar.

The assignee, notwithstanding the pendency of this bill, proceeded to and did, on the 4th day of May, A. D. 1878, sell at public sale the interest of said James Bryar, bankrupt, in said seven acres, to Thomas Campbell, for the sum of $3,500, subject to the payment of the two mortgages aforesaid, as will appear by the deed of Robert Arthurs, assignee of James Bryar, bankrupt, to Thomas Campbell, dated May 22d, 1878, recorded in the Recorder's office of Allegheny county, in Deed Book, vol. 377, page 668. At the date of

this purchase Thomas Campbell had notice of the claim of Jane Bryar to the undivided half of the land, and of the pendency of this bill in equity, and after his aforesaid purchase, to wit: On the 15th of August, 1878, on motion of Rodgers & Oliver, his attorneys, the court allowed him to intervene and make defense to said bill in equity. And on the 25th day of June, 1879, the court allowed complainant to amend her said bill, and on June 26th, 1879, after hearing and argument, the court decreed for the plaintiff for land described in bill, from which decree said Campbell appealed, on the 16th day of July, 1879, to the next Circuit Court. Jane Bryar, plaintiff and appellee, having died on the 28th day of August, A. D. 1890, her death was, on the 27th day of January, 1896, suggested to the court, it was ordered that James, Jr., Emma S., Samuel B., Edward S., Jennie H., Hattie S. and Susan Bryar, her heirs at law, be substituted as plaintiffs and appellees. On the 28th day of January, 1896, plaintiffs moved the court to decree appeal of Campbell deserted, dismiss same, and to affirm decree of District Court, which motion was denied, and the court made an order allowing appellant leave to perfect his appeal and take additional testimony.

Testimony having been taken by appellant under said order it was shown:

That on the —— day of March, 1878, writs of *scire facias* were issued (by leave of the United States District Court granted *to collect* them) on the two mortgages given by James Bryar to Edward R., James and Thomas McClintock, at Nos. 204 and 205 June Term, 1878, Court of Common Pleas No. 1 of Allegheny county, which were duly served, and on April 12th, 1878, judgments were duly entered in default, *sec. reg.* in No. 204 for $2,355.88, and in No. 205 for $3,533.75, which judgments were on the 7th day of June, A. D. 1878 purchased by Thomas Campbell, appellant.

That on judgment at No. 204 June Term, 1878, a writ of *levari facias* was issued, on the 15th day of April, 1878, to No. 195 June Term, 1878, which said writ was on the 30th day of June, 1878, returned by the sheriff "stayed, costs paid by W. B. Rodgers, Esq." That on the 15th day of August, 1879, an alias writ of *levari facias* was issued to No. 277 September Term, 1879, all the above writs being in the Court of Common Pleas No. 1 of Allegheny county, Pa., upon which said writ the property in dispute was sold on the 6th day of September, 1879, to W. B. Rodgers, Esq., agent and attorney for said Thomas Campbell, for the sum of $50, a deed made and duly acknowledged by Thomas H. Hunter, Esq., sheriff, on the 20th day of September, 1879, and delivered to said Rodgers, which said property said Rodgers purchased for and with the money of and afterwards conveyed to Campbell. (See Record, page 48.)

That on the 30th day of August, 1879, and before the said sheriff's sale, Jane Bryar by her next friend, Robert Bryar, presented her petition to the said Court of Common Pleas No. 1 of Allegheny county, Pa., at Nos. 204 and 205 June Term, 1878, praying that she be permited to pay unto court the equal one-half of said two judgments, debt, interest and costs, and upon so doing have the one-half of said judgment, debt, interest and costs marked for her use or for such person or persons as she may appoint. The court granted a rule to show cause, returnable September 3, 1879, at 10 o'clock A. M., and in the meantime all proceeding against the interest in said land claimed by Jane Bryar stayed.

And on September 6th, 1879, said rule was discharged.

On the —— day of January, A. D. 1880, James Bryar and Jane Bryar, his wife, in right of said wife, commenced an action in ejectment in the Court of Common Pleas No. 1, of Allegheny county, against John W. Beckett, W. B. Rodgers and Thomas Campbell, for the land in dispute, said cause

having came on for trial before a jury a verdict for defendant was rendered under instructions of the court, from which plaintiffs appealed to the Supreme Court of Pennsylvania, at No. 184, October and November Term, 1881, which said court by a per curiam affirmed the lower court.

After hearing the Circuit Court below on the 5th of February, 1897, filed a decree reversing the decree of the District Court, from which decree appellants appealed to the Circuit Court of Appeals, Third Circuit, which court on the 9th December, 1898, affirmed decree of said Circuit Court.

CHRONOLOGICAL ORDER OF FACTS.

S. B. McElroy's deed to James Bryar, undivided half of 7 acres.	March 17, 1863.
James Bryar to E. R. James, Mortgage $2,000.	Dated Oct. 1, 1874. Recorded Oct. 2, 1874.
James Bryar to Thomas McClintock. Mortgage $3,000.	Dated Oct. 1, 1874. Recorded Oct. 2, 1874.
James Bryar to Thos. Campbell, three notes, in all $26,717.92, for sale of mill.	Dated Oct. 1, 1874.
Thos. Campbell vs. James Bryar et al. $7,329.81. Judgment at No. 951 Mch. T., 1876, C. P. No. 1, Ally. Co., Pa.	Feby. 10, 1876.
Thos. Campbell vs. James Bryar. $9,059.36. Judgt. at No. 953 Mch. T., 1876, C. P. No. 1, Ally. Co., Pa.	Feby. 6, 1876.
Petition of creditors to have James Bryar declared a bankrupt.	Filed May 19, 1876.

James Bryar adjudicated a bankrupt.	Jany. 8, 1877.
Robert Arthurs chosen assignee.	Feby. 8, 1877.
Register's deed to Robert Arthurs, assignee.	Feby. 24, 1877.
Mrs. Bryar's Bill in Equity vs. Robert Arthurs, assignee, and James Bryar. Dist. Court, U. S.	Filed April 30, 1877.
E. R. James' judgt. on mortgage vs. James Bryar, Com. Pleas No. 1, Ally. Ca., Pa.	April 12, 1878.
Robert Arthurs, assignee, sold to Thos. Campbell, James Bryar's interest in seven acres for $3,500 and mortgages.	May 4, 1878.
Robert Arthurs, assignee, deed to Thos. Campbell, seven acres.	May 22, 1878,
Thomas Campbell paid judgments on James & McClintock mortgages, $6,000.	June 7, 1878.
Thos. Campbell intervened as deft. in Jane Bryar's bill in equity. Dist. Court U. S.	August 15, 1878.
Thomas Campbell obtained possession of the seven acres.	October 5, 1878.
Decree of District Court U. S. on Mrs. Bryar's bill in equity for plff., directing Thomas Campbell to execute deed to her.	Filed June 26, 1879.

Petition of Thos. Campbell to Judge McKennan for appeal. Circuit Court U. S.	Filed June 28, 1879.
Thomas Campbell issues Lev. Fa. vs. James Bryar, Com. Pleas Ally. Co., Pa., on E. R. James' mortgage judgment.	August 15, 1879.
Circuit Court U. S. appeal of Thos. Campbell from District Court judgment.	Filed Aug. 30, 1879.
E. R. James vs. James Bryar, Com. Pleas Ally. Co., Pa. Shff's. sale of seven acres to Thos. Campbell.	Sept. 7, 1879.
Campbell's use vs. James Bryar, Com. Pleas Ally. Co., Pa., Shff's. deed to Thomas Campbell for 7 acres.	Sept. 20, 1879.
Jane Bryar vs. Thomas Campbell, Com. Pleas No. 1, Ally. Co., Pa. Ejectment for one-half of 7 acres.	Jany. , 1880.
Jane Bryar vs. Thomas Campbell, verdict in ejectment for deft. Com. Pleas. Ally. Co., Pa.	May 19, 1881.
Judgment on verdict.	June 10, 1881.
Judgt. affirmed by Supreme Court of Penn'a.	Nov. 14, 1881.
Jane Bryar died.	August 28, 1890.
Jane Bryar's Heirs substituted in the U. S. Circuit Court.	January 27, 1896.

Circuit Court U. S. Motion of Jane Bryar's Heirs to dismiss defts. appeal of June 28, 1879, as deserted. Motion refused.	January 28, 1896.
Circuit Court U. S. Jane Bryar's Heirs vs. Thos. Campbell. Deft. allowed to perfect appeal and take further testimony.	January 28, 1896.
Circuit Court, U. S. Decree reversing judgment of District Court of June 26, 1879.	February 5, 1897.
Circuit Court, U. S. Jane Bryar's heirs appeal to Circuit Court of Appeals, Third Circuit.	August 5, 1897.
Circuit Court of Appeals. Decree affirming decree of Circuit Court.	December 6, 1898.
Supreme Court of the United States. Jane Bryar's heirs' appeal allowed.	January 20, 1899.

ASSIGNMENTS OF ERROR.

The said United States Circuit Court of Appeals, Third Circuit, erred as follows, viz:

1. In finding as a fact as follows:

"Subsequently (June 29, '78) Campbell was brought in as a defendant."

2. In the first conclusion of law, as follows:

"First the suit at law must be treated as an abandonment of the proceeding in equity."

3. In the second conclusion of law as follows:

"Second (if not) the verdict of the jury must be regarded as a conclusive finding of the facts, in which plaintiffs case rests, against her."

4. The court erred in affirming motion and order of the Circuit Court of January 28th, 1896, to wit:

"And now December ——, 1895, it appearing to the court that an appeal was duly allowed from the decree of the District Court of the United States for the Western District of Pennsylvania, made the 26th day of June, A. D. 1879, to this court on the 30th day of August A. D. 1879, and docketed in this court at the above number and term, and it further appearing that said appellants have failed to bring up the record from the said District Court, pay the entry costs in this court or to prosecute their appeal to the next term of this court. It is on motion of L. C. Barton, solicitor for appellee, decreed that said appeal is hereby declared deserted, and the decree of the said District Court is hereby affirmed at costs of appellants."

5. The court erred in affirming the decree of the Circuit Court in making order of 28th January, 1896, to wit :

"And now 28th January, 1896, on due consideration, it is ordered that the motion to dismiss the appeal be denied, and it is further ordered that the appellant have leave to perfect the appeal and to take further testimony."

6. The court erred in affirming decree of the Circuit Court of February 5th, 1897, which decree is as follows, to wit :

"This cause having come on for final hearing upon the proofs, pleadings and written stipulation, was argued by counsel. And now February 5th, 1897, upon consideration the decree of the District Court is reversed; the costs of that court, however, to be paid by Thomas Campbell. And it is further ordered, adjudged and decreed that the bill of complaint be and the same is dismissed without costs in this court."

7. The court erred in not affirming the decree of the District Court, filed June 26th, 1889, which decree is as follows, to wit:

"This cause came on to be heard on the pleadings and evidence, and was argued by counsel for defendants as well as for complainant, and thereupon, and upon consideration thereof, the court doth adjudge and declare Jane Bryar to be the equitable owner of the land in suit, and that Thos. Campbell received a conveyance thereof and does now hold the same with notice of and subject to the right of Jane Bryar therein; and it is ordered and decreed that the said Thos. Campbell do, by good and sufficient deed or deeds, convey to Jane Bryar, or to whom she shall appoint, the one undivided half part of that tract of land situate in the Twenty-first ward of the city of Pittsburgh, bounded and described as follows: beginning at a wild cherry tree; thence north fifteen and three-quarter degrees east (N. 15¾ E.), twenty-nine perches (29 P.) to a post; thence south seventy-seven and one-half degrees east (77½ E.), twenty-five and two-tenths perches to a post (25.2 P.); thence south four degrees west (S. 4 W.), forty-nine and four-tenths perches (49.4 P.) to a post; thence north forty-seven degrees west (N. 47 W.), thirty-nine and three-

tenth perches (39.3 P.) to the place of beginning; free from all encumbrances done by him or any person or persons claiming by, from or under him; and do account with the said Jane Bryar for all the rents and profits which the said Thomas Campbell has or might without willful default have received from said land, less a just allowance for taxes and repairs on same; and that each party do pay his or her own costs incurred in this procoeding."

8. The court erred in doubting the jurisdiction of the District Court, as follows:

"Granting that the District Court had jurisdiction to enter the decree (which may well be doubted, to say the least), and that the Circuit Court had authority to do more than reverse and dismiss the bill for want of such jurisdiction."

ARGUMENT.

It is provided by section 4980, Revised Statutes, title, "*Bankruptcy*":

> "Appeals may be taken from the District to the Circuit Courts in all cases of equity, * * * * * arising under this title, when the debt or damages claimed amount to more than five hundred dollars. * * * *."

And section 4981 reads:

> "No appeal shall be allowed in any case from the District to the Circuit Court, unless it is claimed, and notice given thereof to the Clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee, or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from; nor unless the appellant, at the time of claiming the same, shall give bond in the manner required in cases of appeal in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs."

The docket entries of the District Court (Record, page 3) show that the decree was entered on June 26th, 1879, and that the appeal to the Circuit Court was not allowed or filed in that court until July 16th, 1879—twenty days after the entry of the appeal, and ten days more than allowed by law —and it further shows that no notice was given to the Clerk of the District Court of the claiming of said appeal, nor was notice of any kind given to the "defeated" party, as required by said Act.

Mr. Justice Miller, in Wood vs. Baily, assignee, 21 *Wall*, 640, says, in relation to the 8th section of the Bankrupt Act (sections 4980 and 4981, Revised Statutes):

> "The language of the statute is very strong and admits of no other interpretation: 'No appeal shall be allowed, *in any case, from the District to the Circuit Court*, unless it is claimed, and notice given to the Clerk, and also to the other party, within ten days after the entry of the decree appealed from.' The failure to give notice to the other party within the ten days, whether claimant or assignee, is equally fatal to the appeal, as the failure to give notice to the clerk that the appeal is claimed."

The word "defeated" * * * should be construed as meaning the "opposite" adverse or successful party. *Ibid.*

It is also provided by the Bankrupt Act, §4982, Revised Statutes.

> "Such appeal shall be entered at the term of the Circuit Court which shall be held within the district next after the expiration of ten days from the time of claiming the same."

Said appeal was allowed July 16th, 1879, and entered in the Circuit Court on August 30th, 1879, to No. 30 November Term, 1879, the appeal to have been in time, even if claimed in time, should have been entered not later than July 26th, 1879. In *ex. parte.* Woollen 104 *U. S.*, 302.

> "it was judicially determined that section eight of the Bankrupt Act required appeals to be filed during the first term which happened to be in session after the expiration of ten days."

At the time said appeal was filed the May Term, 1879, of the Circuit Court was in session, and continued in session until the 2d Monday in November, 1879, and appeal not having been entered to that term it was fatal.

It was the duty of appellant to have had his appeal entered, heard and determined by that court.

Ex-parte Woollen, *supra.*
Castro vs. U. S., 3 *Wall*, 47.
U. S. vs. Specie, 1 *Woods*, 14.
The Glenmorgan, 2 *Curt*, 236.
Glouster Ins. Co. vs. Younger, *Ibid*, 322.
The "Hollen," 1 *Mason*, 431.
The New England Ins. Co., 3 *Sum*, 495.

The tenth section of said Bankrupt Act (§ 4990 Revised Statutes) provides, "that the justices of the Supreme Court should, subject to the provisions of the act, frame 'general orders,' among other things, for regulating the practice and procedure upon appeals."

Under said act, General Order No. 26, approved April 12th, 1875, provides,

> "Appeals in equity from the District to the Circuit Court, * * * * * shall be regulated by the rules governing appeals in equity in the courts of the United States, * * * *"

The Judiciary Act of 1789 and the additional act of 1803, (§ 631 Revised Statutes,) gives an appeal from all final decrees of a District Court in Equity, where the amount in dispute exceeds fifty dollars, exclusive of costs, and § 632 provides,

> "In case of an appeal, as provided by the preceding section, copies of the proofs and of such entries and papers on file as may be necessary in the hearing of the appeal may be certified to the Appellate Court."

While the language of the Act is "*may* be certified" it cannot but be contended that the same should be construed *shall*, as it was never the intention of the framers of the Act to leave it discretionary with the appellant as to whether the

record should be taken to the appellate court, and the late Chief Justice Chase, in Castro vs. U. S., *supra*, said:

> "The Acts of Congress providing for and regulating appeals have been often under the consideration of this court, and it may now be regarded as settled that in cases where appeals are allowed by the Judiciary Act of 1789 and the additional Act of 1803, the writ of error or the allowance of appeal, together with a copy of the record, and the citation, where a citation is required, must be returned to the next court after the writ is sued out or the appeal allowed, otherwise the writ of error, or appeal, as the case may be, will become void, and the party desiring to invoke the appellate jurisdiction will be obliged to resort to a new writ or a new appeal."

This applies to all appeals, including appeal in this case.

All the authorities are the same. In case of an appeal the transcript must be filed at the next term or it is invalid.

The Virginia vs. West, 19 *How.*, 182.
Ins. Co. vs. Mordeci, 21 *How.*, 195.
Castro vs. U. S., 3 *Wall*, 47.
Edmondson vs. Bloomshire, 7 *Wall*, 306.
The Lucy, 8 *Wall*, 307.

And thus we find on the 28th day of January, 1896, when motion was made to the Circuit Court to dismiss the appeal, that appellant had not complied with the laws and rules regulating appeals in such cases in the following particulars:

1. The appeal was allowed by the *Circuit Court* twenty days after decree of District Court was entered, being ten days more than allowed by law.

2. Appellant had not given notice to the clerk of the District Court of his claiming an appeal within ten days after the entry of decree.

3. Appellant had not given Jane Bryar, the successful party, notice of claiming said appeal within ten days, as required by law.

4. Said appeal was not entered at the term of the Circuit Court which was held within the district next after the expiration of ten days from the time of claiming the same.

5. Appellant had not brought up the record of the District Court to the Circuit Court.

But notwithstanding the gross neglect of appellant, as aforesaid, said Circuit Court (Buffington, D. J.) sixteen years after refused to dismiss said appeal, but allowed the same to be perfected and additional testimony to be taken, and said testimony proposed to be taken was not after-discovered evidence, but such that appellant was cognizant of before entry of the decree in the District Court (see petition to revoke, Record, page 30).

> "The validity of such appeal cannot be restored by a subsequent order of the Circuit Court."
>
> Edmondson vs. Bloomshire, *supra.*
> The Lucy, *supra.*

And this we maintain was error in said court and should have been reversed by the Circuit Court of Appeals (Fourth and Fifth Assignments of Error).

But after the Circuit Court did, contrary to law, proceed to hear and determine said cause, it erred in making the decree of February 5, 1897 (Third Assignment of Error).

The learned judge of the Circuit Court, as shown by his opinion (Record, page 34), reasons that appellants here having brought their action in the State courts after the decree of the District Court was filed and appeal to Circuit Court taken, and the decision there having been against them they were concluded. But we maintain that the State courts had no jurisdiction, and consequently their verdict and judgment

void, the action there not having been brought until January, 1880, and after appellee here had through neglect lost his right to appeal from the District to the Circuit Court and allowed the same to become invalid, and after the next Circuit Court, held after the expiration of ten days from the time of claiming appeal had passed, which in this case was May Term, 1879, and appellee here not having perfected his appeal and had the same heard and determined, the decree of the District Court was in full force, and, in fact, it stood in full force and effect until reversed, and as ruled by the learned judge below in this case.

> "It is well settled that in ejectment upon an equitable title one verdict and judgment are conclusive of the title."
>
> Peterman vs. Hulings, 31 *P. S.*, 432.
>
> Winpenny vs. Winpenny, 92 *P. S.*, 440.

> "This being an established rule of property in Pennsylvania, an equally conclusive effect is to be given to such verdict and judgment in the courts of the United States."
>
> Miles vs. Caldwell, 2 *Wall*, 36.

It cannot be contended but that a decree in equity is the same as a verdict or judgment at law. And so appellants here having gotten one verdict and judgment in the District Court—a court of competent jurisdiction—which verdict or judgment is unreversed and not appealed from; all parties were and are concluded by said judgment.

Forsyth vs. Hammond, 166 *U. S.*, 518.

And consequently it necessarily follows that the action in the State courts, not having been brought until after that decree was entered, its decision was void, the matter being *res judicata.*

The jurisdiction of the District Court attached on the 7th day of May, 1877, as of April 30, 1877, while, as before stated, the action was not brought in the State courts until January, 1880, it was held by this court.

In re. Chetwood, 165 *U. S.*, 443:

> "Where the jurisdiction of a court and the right of plaintiff to prosecute his suit in it, have once attached, the right cannot be arrested or taken away by proceeding in another court."

Also, in R. R. Co. vs. Gomila, 132 *U. S.*, 485:

> "Where a State and Federal court have concurrent jurisdiction over the same subject matter, the court which first obtains jurisdiction will retain it to the end of the controversy."

To the same effect is:

Wallace vs. McConnell, 13 *Pet.*, 136.

Taylor vs. Tauter, 16 *Wall.*, 366–370.

And before jurisdiction could attach in the State courts the action in the District Court should have been discontinued and the same could not have been done without leave of court, and that was not done in this case, and surely the plaintiff could not by any action of his—such as bringing his action in the State courts—oust the jurisdiction of the Circuit and District Courts without the consent of those courts.

This case presents the spectacle of two courts deciding the same question between the same parties in different ways. The second decision made by the Common Pleas, in the ejectment, was made while the same question was pending in the United States courts. It was an invasion of the jurisdiction of the United States District Court, and therefore is a void judgment. The authorities are numerous and uniform to this effect.

"A court of co-ordinate jurisdiction is without power to act in a matter pending in the other court."

Maclean vs. Speed, 52 *Mich.*, 257.

"A court must ascertain that it has jurisdiction, before proceeding in a cause, notwithstanding that the parties are willing to concede the jurisdiction."

1876, Phillips vs. 11 *Nev.*, 187.

Why, therefore, did not the Common Pleas stop, when the record of the United States District Court was produced in evidence in the ejectment suit, and decline to enter any judgment whatever?

"A court is bound to inquire, in every case, whether the facts in the case give jurisdiction, although the point is not presented by counsel."

Stamps vs. Newton, 4 *Miss.*, (3 *How.*), 34.

"A court once obtaining jurisdiction of the parties and subject matter has the right to decide every question arising in the cause; and such decision is binding until reversed."

Evans vs. Percifull, 5 *Ark.*, 424.

"If a State and federal court have concurrent jurisdiction of the subject matter of a suit, the court in which legal proceedings are first instituted acquires jurisdiction to the exclusion of the other court."

Parks vs. Wilcox, 6 *Col.*, 489.

1 *Freeman on Judgments* (4th Ed.) page 181, §118.

Jane Bryar could not give the Common Pleas jurisdiction of her ejectment by issuing a writ there. Jurisdiction of the subject matter of a cause is not within the power of the parties to give, however the rule may be as to jurisdiction of parties.

The decision of the Common Pleas is based on the subrogation of Thomas Campbell to some supposed rights of Edward R. James. Campbell never was, and was not entitled to be, subrogated to the rights of James, nor to be invested with them.

> "Subrogation is a doctrine primarily of equity jurisprudence, although its principles have often, and of late years with increasing frequency, been applied in courts of common law, especially in those States in which equitable remedies are administered through the forms of law. It is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the right of the creditor in relation to the debt. The subject is put in all respects in the place of the party to whose rights he is subrogated. It is derived from the civil law, from which it has been adopted by courts of equity. In this country, under the initial guidance of Chancellor Kent, its principles have been more widely developed, and its doctrines more generally applied, than in England. It is treated as the *creature of equity*, and is so administered *as to secure real and essential justice* without regard to form, and is independent of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter; but is not to be applied in favor of one who has, *officiously* and as a *mere volunteer*, paid the debt for another, *for which neither he* nor *his property* was answerable *and which he was under no obligation to pay;* and *it is not allowed where it would work any injustice to the rights of others.*"
>
> *Sheldon on Subrogation*, § 1, page 1.

Jane Bryar was a creditor of James Bryar equally meritorious with Thomas Campbell; besides having an equitable estate which, if second to James' mortgage rights, was, by no rule of equity, second to Campbell's rights.

> "Subrogation will be applied only in favor of one who has actually performed the obligations of another, and thereby entitled himself to the rights and advantages incident to the discharge of such obligations. *No such merit can be attached to the mere extinguishment of another's right* by legal means. Consequently, a prior mortgage acquires no right, by the foreclosure of his mortgage, to redeem from an incumbrance subsequent to his own."
>
> *Ibid*, page 3, § 3.

The court cannot allow itself to be used "as a club to beat a dog"—nor as a means of destroying Jane Bryar's equitable estate for the advantage of Thomas Campbell.

> "Subrogation is a mode of equitable relief. The law of subrogation is the exercise of the equitable powers of the court, to afford a summary relief to a *meritorious* creditor, who might otherwise be subjected to loss by the operation of proceedings at law against the estate or funds of one who is indebted both to him and to others. The equitable remedy is allowed *only* when it does not conflict with the legal or equitable rights of other creditors of the common debtor. The principle is one of equity merely, and will be carried out in the exercise of a proper discretion, *with a due regard to the legal and equitable rights of others.* The claimant who asks this equity must be governed by the common maxim, 'Sic utere tuo ut alienum non hedas.' Being a doctrine of mere equity and benevolence, it will never be enforced at the expense of a legal right. Thus, where the claim of a surety for money paid by him on a judgment against his principal *has been defeated at law* (the converse of this very case) the surety cannot in equity be substituted to the rights of the creditor in the original judgment, as would otherwise be the case."
>
> *Ib.*, §4, pages 4–5.

> "Legal subrogation, or subrogation by operation by law, takes place *only* for the benefit of one who, being himself a creditor, pays another creditor whose

claim is preferable to his own by reason of privileges or mortgages."

Sheldon on Sub., §5, pp. 5–6.

"The true principle, I apprehend, is, that where money due upon a mortgage is paid, it shall operate as a discharge of the mortgage or in the nature of an assignment of it, as may best *serve the purposes of justice* and the just intent of the parties.

"Many cases state the rule in equity to be that the incumbrance shall be kept on foot or considered extinguished or merged, according *to the intent or the interest of the party paying the money;* but the decisions themselves, it is believed, will generally be found in accordance with the principle above stated."

Sheldon on Sub., pp. 15–16, § 12.

"The doctrine of subrogation," said Mr. Chancellor Johnson, "is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature could never have been intended for the relief of those who were in a condition in which they were at liberty *to elect* whether they would or would not be bound; and, so far as I have been able to learn its history, it has never been so applied.

"If one with a perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty."

Sheldon on Sub., p. 278, §240.

"The voluntary payment of a debt by a stranger extinguishes it.

"Subrogation by operation of law exists in favor, not of all who pay the debt of another, but only in favor of those who, *being bound for it*, have therefore discharged it.

"The demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such a third person, is absolutely ex-

> tinguished by the payment. It is a well-settled general rule that no one can be allowed to obtrude himself upon another as his surety."
>
> *Ib.*, p. 279, §241.

If his Honor Judge Acheson had power to reverse a judgment of the District Court, sixteen years after the appellant had deserted his appeal from that judgment; and if the Court of Common Pleas of Allegheny county had power to assume control of a litigated cause and to render a valid judgment therein four years after that cause had come upon the records of the United States District Court, and while it was still pending there; the merits of Jane Bryar's cause still remain with her heirs, and the appellant respectfully submits that this court would render justice by reversing the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court of the Western District of Pennsylvania, thus leaving the judgment of the District Court to stand forever; because Jane Bryar was, being a defrauded *cestui que trust.*, a more meritorious *creditor* of James Bryar than Thomas Campbell was (Garnes vs. Bank, 151 *U. S.*, 420), and because the Common Pleas exerted its equity powers in favor of the wrong party, destroying Jane Bryar's equitable title, working great injustice to her for the benefit of Thomas Campbell without justification, without fault of Jane Bryar, and in direct opposition to the unimpeachable decree of the District Court of the Western District of Pennsylvania, sustaining her title and adjudging Campbell to be a *mala fide* claimant of it.

The evidence of the plaintiff was clear, ample and sufficient to establish that she bought from S. B. McElroy the property in dispute and paid the consideration or purchase money with her own separate estate, and that the deed from S. B. McElroy was, by mistake, oversight or otherwise, made

to James Bryar (her husband) instead of to her. These facts clearly establish a resulting trust in Jane Bryar.

> "A trust results in favor of a wife where her husband purchases land with her separate estate, taking a deed in his own name."
>
> Stickney vs. Stickney, 131 *U. S.*, 227.
>
> Lloyd vs. Woods, 176 *P. S.*, 63.
>
> Hay vs. Martin, 14 *Atlantic*, 333.
>
> Hay vs. Martin, 13 *Central*, 217.
>
> Heath vs. Slocum, 115 *P. S.*, 549.
>
> Rupp's Appeal, 100 *P. S.*, 537.
>
> Henderson vs. McClay, 5 *Central*, 225.
>
> Krauth vs. Wheele, 18 *Atlantic*, 351.
>
> Brooks vs. Fowler, 9 *Southeastern*, 1089.
>
> Evans vs. Wahan, 11 *Southwestern*, 230.

Where a husband invests his wife's money and takes the title in himself, without his wife's consent, she has a resulting trust in the land, which she can assert at any time she sees proper to enforce it:

> Light vs. Zoller, 144 *P. S.*, 570–582.
>
> "A resulting trust arises where an estate has been purchased in the name of one person and the purchase money or consideration has proceeded from another. In this case the presumption of law is that the party paying for the estate intended it for his own benefit, and the nominal purchaser is a mere trustee."
>
> *Brightly's Equity Jurisdiction*, page 339, section 412.
>
> Lynch vs. Cox, 7 *Harris*, 265.
>
> German vs. Gabbald, 3 *Binney*, 305.
>
> Wallace vs. Duffield, 2 *S. & R.*, 529.
>
> Kisler vs. Kisler, 2 *Watts*, 324.
>
> Robertson vs. Robertson, 9 *Watts*, 35.
>
> Barnet vs. Dougherty, 8 *Casey*, 371.

"It is the law that where one buys land and pays for it with his own money, but permits the conveyance to be made in the name of another, a resulting trust arises in favor of him who paid the purchase money, and the nominal grantee holds the land as trustee of the real purchaser."

Brightly's Equity, supra.
Cox vs. Grant, 1 *Yeates*, 164.
Folger vs. Eary, 2 *Yeates*, 119.
Strimpler vs. Roberts, 61 *Harris*, 295.
Galbraith vs. Galbraith, 190 *P. S.*, 225.

And as trusts of this kind are expressly exempted from the statutes of frauds, it is competent for the real purchaser to prove the payment of the purchase money by parol evidence, though it be otherwise expressed in the deed.

Brightly's Equity, sec. 413–4.
Adams' Equity, sec. 33–4.
Jackman vs. Ringland, 4 *W. & S.*, 150.
Staymaker vs. St. John, 5 *Watts*, 30.
Lloyd vs. Cater, 5 *Harris*, 221.
Blyholder vs. Gibson, 6 *Harris*, 137.
Stumpfler vs. Roberts, 6 *Harris*, 295.

Jane Bryar being in possession before and at the time she purchased and continued in possession continuously from that time till September, 1878, when she was ousted by order of court, (appendix, page 36,) and being in possession at the time this suit was brought, her right to recover is not barred by the Act of 1856. See appendix, page 25.

"A case is not within the Act of 1856 relating to resulting trust, when the *cestui que trust.* has possession while the statute is running. If the statute had begun to run, this would stop it; if possession

had preceded the trust relation, it would not begin to run."

Clark vs. Trindle, 2 *Smith*, 492.

Webster vs. Webster, 3 *Smith*, 161.

Willard vs. Willard, 6 *Smith*, 119.

Douglas vs. Lucas, 13 *Smith*, 11.

"The limitation of the Act of April 22, 1856, *P. L.*, 533, as to the time in which a resulting trust must be asserted, does not run against a married woman."

Blanks Estate, 18 *W. N. C.*, 455.

Miller vs. Becker, 160 *P. S.*, 172.

Miller vs. Becker, 166 *P. S.*, 414.

At the time James Bryar was forced into bankruptcy the fee to the undivided one-half of said seven acres was in him, and to the other undivided one-half he held title as trustee for his wife, Jane Bryar; and when Campbell purchased at assignee's sale he took no more than Bryar had, and stood in the same relation to Jane Bryar that James Bryar did. Now, what notice had Campbell of the claim of Jane Bryar to this property? He was aware of the filing of this bill at the time of his purchase, or ought to have been.

"*Lis pendens* is notice to all the world as to the subject matter of the writ."

Diamond vs. Lawrence Co., 1 *Wright*, 353.

Walker vs. Butz, 1 *Yeates*, 574.

Fessler's Appeal, 25 *Smith*, 483.

Snively vs. Hitchen, 9 *Smith*, 49.

Campbell's own testimony shows (page 23, Record) that in the year 1875 he was negotiating a mortgage for $25,000 with James Bryar on the land in dispute, and he testifies (page 25, Record) as follows, viz.:

> "At the time of the negotiation of this mortgage there had been some talk of Mrs. Bryar owning this property." "The seven acre tract?" "Can't say who told me, but some one, I think, told me."

So, away back in 1875 Campbell had notice of Mrs. Bryar's title.

> "One who acquires the legal title to land, with actual knowledge of an existing equitable title, is a trustee of the legal title, holding it for the benefit of the equitable title."
>
> Bailey vs. Wrin, 12 *Southwestern R.*, 1045.
>
> Rainage vs. Paine, 27 *Supreme Court R.*, 39.
>
> Haack vs. Werckin, 23 *Northeastern R.*, 133.

A purchaser of trust property with notice is considered in equity a trustee for the beneficial owner:

Walsh vs. Steele, 2 *Chest*, 427.

But Campbell so being the trustee of said property for Mrs. Bryar, not regarding the rights of his *cestui que trust.*, but in order, as he supposed, to benefit himself, buys in the two judgments against James Bryar on the two mortgages and proceeds and sells the property of his *cestui que trust.* at sheriff's sale and buys it in. It is true that it is done through a third person, but Campbell furnished the money and the property was purchased for Campbell, and afterwards a deed made to him for it as admitted.

See Record, page 33.

A purchase by trustee, through a third person, of property of his *cestui que trast.* is void, though the sale was at public auction.

Michond vs. Gerod, *et al*, 4 *How.*, 530.

A trustee cannot purchase an outstanding title or encumbrance on the trust estate, but he holds it for the benefit of his *cestui que trust.*

Gilman vs. Healy, 7 *N. Y. S. Reporter*, 643.

If a trustee traffics for his own profit in property held by him in trust, the beneficiary may claim the property as his.

Hughes vs. Hughes, 6 *Southern R.*, 353.

A trustee who purchases trust property at sheriff's sale, any profit or benefit resulting from such purchase belongs to his *cestui que trust.*

Mullen vs. Doyle, 47 *L. I.*, 48.

Ricket's Appeal, 21 *W. N. C.*, 229.

The office of trustee is important to the community at large. It is one of confidence. The law regards the incumbent with jealous scrutiny, and frowns sternly at the slightest attempt to pervert his powers and duties for his own benefit.

R. R. Co. vs. Durrant, 95 *U. S.*, 479.

Purchasers at sheriff' sale under a judgment against the husband with notice of the wife's equity take no title as against the wife.

Miller vs. Beker, 160 *P. S.*, 172.

A trustee cannot claim adversely to those for whom he acquired and holds the property.

R. R. Co. vs. Durrant, 95 *U. S.*, 576.

Section 5053 Revised Statutes U. S., page 982 provides:

> "No property held by the bankrupt in trust shall pass by the assignment."

Having already shown that James Bryar, the bankrupt, at and before his bankruptcy, held the land in dispute in trust for the appellant, the conveyance by the register to the as-

signee passed said bankrupt's interest in the same, seven acres, nothing more, and did not affect the appellant's interest in the same, and that is all the assignee could sell.

Under the English statutes he (the assignee in bankruptcy) notoriously succeeds to no more than the estate and effect of the bankrupt, burdened with their former equities and encumbrances.

> "The assignee in bankruptcy does not occupy the position of a *bona fide* purchaser without notice."
>
> Twelves vs. Williams, 3 *Wharton*, 485.
> Cowder vs. Pleasants, 9 *Barr*, 59.
> Galbraith vs. Fisher, 10 *Harris*, 406.

At the time Campbell purchased at assignee's sale, by the terms and conditions thereof, he bought subject to the payment of the first mortgages, being the McClintock and James mortgages. The assignee, under the order of said court, sold the land subject to the payment of said mortgages, as he was empowered to do under section 5066 of the Bankrupt Act. Could language be plainer than that set forth in deed to Campbell, Appendix, page 34, lines 17 ff.

> "and did then and there sell the same, *subject only to the payment of said mortgages*, to Thomas Campbell for the sum of three thousand five hundred dollars."

When Campbell paid off the mortgages their liens on the land thereby became extinct and a sale thereon by the sheriff would be void.

> "If the plaintiff in a judgment became the owner of the land upon which that judgment is a lien, the lien thereby becomes extinct by operation of law, and no subsequent sale of the land by the sheriff upon that judgment will vest a title in the purchaser."
>
> Koon vs. Hartman, 7 *Watts*, 20.
> Wright vs. Knepper, 1 *Barr*, 361.

"Where one purchases at sheriff's sale a property subject to a mortgage, and subsequently pays off the mortgage, it is an extinguishment of the debt, and he cannot take an assignment of it and enforce it against the mortgagor. The mortgage, in such a case, is part of his bid."

Dollar Sav. Bank vs. Burns, 6 *Norris*, 491.

Hansell vs. Luty, 8 *Harris*, 284.

We are willing to concede a mortgagee is a purchaser within the protection of the recording acts, and as such takes the estate freed from any existing secret equity of which he has not had notice, actual or constructive. And we may further concede that the mortgagees of James Bryar in this case had no notice, either actual or constructive, of the equitable title of Jane Bryar in the land further than possession by her and her husband would be constructive notice. Admitting, then, that these mortgages were protected under the recording acts against the equitable estate of Jane Bryar, of which they had not notice, how can the defendant, Thomas Campbell, take advantage of their protection, he having bought the land at assignee's sale, with notice, both actual and constructive, of Jane Bryar's equitable interest in the same, the bill in this case having been filed before his purchase, and expressly subject to the payment of said mortgages. He knew the only interest the assignee could sell and convey was the interest of James Bryar, which consisted of an individual half, and he was willing to bid and give for that interest $3,500 and pay off the aforesaid mortgages, which then aggregated $6,000. In other words, he he was willing to give $9,500 for James Bryar's undivided half in said seven acres. He having thus purchased the land he had no equity to protect that would justify him in using said mortgages to destroy and vest in himself the trust estate of Jane Bryar. The paying off of the mortgages was only a compliance with his

bid, and when paid by him they were extinguished and a sale on either of them would be void. He got what he bought, and for the price he agreed to pay. He had no right to complain because his purchase resulted in freeing the trust estate from the liens or encumbrances of the mortgages. He agreed to do that when he bought, expressly subject to their payment, and knew, too, that he was buying only an undivided half of the land, to wit: the bankrupt's interest therein. That interest was worth, at the time of the assignee's sale, taking Campbell's testimony (page 24, Record), from five to eight thousand dollars per acre, or at least $17,500.

The evidence further shows, page 33 Record, that Mrs. Bryar offered to pay the half of the amount of said judgments on said mortgages before the sheriff's sale but was not allowed to do so.

It was suggested on the trial of the case in the Court of Common Pleas No. 1, that plaintiff is estopped by having, with her husband, executed deeds to various persons for portions of the land sued for.

The defendant was not, nor could not be misled or injuriously affected by the description in those deeds executed many years before the defendant became interested in the land.

> "An estoppel can only be pleaded by one who was diversely affected by the Act which constitutes it."
>
> Cuttle vs. Brockway, 8 *Casey*, 50.

> "Where a husband purchases property with his wife's money and takes title in his own name there is a resulting trust in her favor. That she joined in a deed of a portion of the land does not estop her from setting up such a trust as to the balance."
>
> Hay vs. Martin, 14 *Atlantic*, 333.
>
> Hay vs. Martin, 13 *Central*, 217.

The learned Judge of the Court of Appeals, (Butler) in the opinion of the court, says (Record page 39):

"Granting that the District Court had jurisdiction to enter the decree (which may well be doubted, to say the least.")

The learned judge is the first to raise the question of the jurisdiction of the District Court. This is a suit against an assignee in bankruptcy brought by a person claiming an adverse interest in the property transferred to such assignee, and Thomas Campbell was made a party to the action on August 15, 1878, not June 29, 1878, upon his own petition and of his own motion, admitting the jurisdiction of said court and placing himself thereunder.

"Under section 4979 Revised Statutes, the Circuit Court of the United States has, without reference to the citizenship of the parties, jurisdiction of a suit against an assignee in bankruptcy brought by any person claiming an adverse interest touching any property or rights of property transferred to or vested in such assignee."

Burbank vs. Bigelow *et al.*, 92 *U. S.*, 179.

"The original jurisdiction is conferred upon the Circuit Court concurrent with the District Court of the same district, in all suits at law or in equity, which may be brought by the assignee in bankruptcy against any person claiming an adverse interest or by such person against such assignee, touching any property of said bankrupt transferred to or vested in such assignee."

Shearman vs. Bingham *et al.*, 7 *Bank Reg.*, 490.
Lathrop Assignee vs. Drake *et al.*, 91 *U. S.*, 516.
Adams vs. Collier, 122 *U. S.*, 382.

"A suit cannot properly be dismissed by a Circuit Court of the United States as not substantially involving a controversy within the jurisdiction of the Court, unless the facts, when made to appear on the record, create a legal certainty of that conclusion."

Barry vs. Edmunds, 116 *U. S.*, 550.

EDWARD CAMPBELL,
LOWRIE C. BARTON,
Counsellors for Appellants.

APPENDIX.

ASSIGNEE'S DEED TO THOMAS CAMPBELL,

Made the twenty-second day of May, in the year of our Lord one thousand eight hundred and seventy-eight, between Robert Arthurs, assignee in bankruptcy, and James Bryar, of the city of Pittsburgh, county of Allegheny, State of Pennsylvania, of the first part, and Thomas Campbell, of the same place, of the second part. Witnesseth, that whereas the said James Bryar, in the District Court of the United States, for the Western District of Pennsylvania, at No. 2742 in said court, was adjudged a bankrupt, and the said Robert Arthurs duly elected and confirmed assignee; and the said bankrupt was, at the time, seized of the following described real estate, viz: All that certain piece of land situate now in the Twenty-first ward in the city of Pittsburgh, county of Allegheny, State of Pennsylvania, bounded and described as follows, to wit: Beginning at a cherry stump, about two hundred and thirty feet from the Pennsylvania Railroad, and near the western line of Fifth avenue; thence along the line of land owned by Julius Voetter and others N. 14° 49′ E. to a point one hundred and thirty-one feet six inches from Frankstown avenue; thence S. 62° 09′ E. at right angles with Fifth avenue to the centre of the same; thence by the centre line of Fifth avenue N. 27° 50½′ E. to the centre of Frankstown avenue; thence by the centre line of Frankstown avenue S. 78° 25′ E. fourteen and $\frac{54}{100}$ perches, more or less, to a monument stone in said avenue; thence by the same centre line S. 79° 58½′ E. twenty-nine $\frac{18}{100}$ feet; thence S. 3° 38′ W., fifty and nine-tenths perches to the line of property now owned by the Liberty Improvement Bank; thence by the same N. 47° 02′ W., thirty-nine $\frac{15}{100}$ to the place of beginning, containing about seven acres, more or less, upon which are erected a large brick house and several outbuildings, also a tenant house and barn.

And whereas, upon the said petition of the said Robert Arthurs, assignee, the said court did, on the 19th day of May, A. D. 1877, order and direct the sale of said real estate divested of all liens, and subsequently, to wit, on the day of A. D. 187 , did order and direct that the same should be sold, divested of all lieus, or subject only to the first mortgages, amounting to about six thousand dollars, as the assignee might deem to the interest of said estate.

And whereas, after due and legal notice by advertisement and otherwise, the assignee did, on the fourth day of May, A. D. 1878, at four o'clock P. M., on the premises, as directed by said court, did expose the said before described piece of land, with the buildings, and subject to the first mortgages, viz: Mortgages of James Bryar to Thos. McClintock, recorded October 2, 1874, in vol. 161, p. 637, and James Bryar to E. P. R. James, recorded October 2, 1874, in vol. 161, p. 640, to public sale, and did then and there sell the same, subject only to the payment of said mortgages, to said Thomas Campbell, for the sum of three thousand five hundred dollars, that being the highest and best price bidden for the same; and on the 6th day of May, 1878, said assignee made return of said sale to said District Court, and which was on May 21, 1878, confirmed absolutely, and the assignee ordered to make and deliver to Thomas Campbell, the purchaser, a deed for the same, as by reference to the records of said court at No. 2,742, in bankruptcy, will more fully appear.

Now this Indenture Witnesseth, That the said Robert Arthurs, assignee of James Bryar, bankrupt, for and in consideration of the sum of thirty-five hundred dollars, lawful money, unto him in hand well and truly paid by said Thomas Campbell, the receipt of which is hereby acknowledged, has granted, bargained, sold and by these presents, (by virtue of and in obedience to the orders of said court,) doth grant, sell, enfeoff, release and confirm unto the said Thomas Campbell, his heirs and assigns, all the right, title and interest of the said Robert Arthurs, assignee of said James Bryar, bankrupt, of in and to all the before described tract of land, with the reservations, and subject to the first mortgage as aforesaid, with the appurtenances, together with all and singular, the

rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property claim or demand whatsoever of the said Robert Arthurs or of the said James Bryar, of, in, to or out of the same: *To have and to hold* the said described tract of land, with the buildings and reservations, the hereditaments and premises hereby granted, or intended so to be, with the appurtenances, unto the said Thomas Campbell, his heirs and assigns, to the only proper use and behoof of the said Thomas Campbell, his heirs and assigns forever.

In Testimony Whereof, The said party of the first part has hereunto set his hand and seal, the day and year first above written.

Signed, sealed and delivered in presence of GEO. I. WHITNEY. } ROBERT ARTHURS, [SEAL] *Assignee of James Bryar.*

Received as of the day of the date of the above indenture of the above named Thos. Campbell three thousand and five hundred dollars, the consideration money above mentioned in full. ROBERT ARTHURS, *Assignee.*

In the matter of the Bankruptcy of James Bryar. } Western District of Pennsylvania, No. 2742.

PETITION—Filed August 23rd, 1878.

To the Honorable the Judges of the District Court of the United States, Western District of Pennsylvania.

The petition of Thomas Campbell respectfully shows, etc.: That on the 8th day of January, 1877, James Bryar of the city of Pittsburgh in said district was duly adjudged a bankrupt by this court and Robert Arthurs was afterwards chosen assignee, which choice was afterwards duly approved; that by the assignment to Robert Arthurs of the estate pursuant to

Sec. 5,044 of the Revised Statutes there vested in said assignee the title of said bankrupt of and in (*inter alia*) certain real estate consisting of about seven acres in 21st ward, Pittsburgh, of which said bankrupt was then seized and claimed to be seized in fee simple and in severalty on which was erected the said bankrupt's dwelling house. That on the 4th day of May, 1878, pursuant to the order of this Honorable Court the said assignee sold at public auction to your petitioner the said real estate, which sale upon report thereof made, was confirmed by your honors on the 21st day of said month and the assignee ordered to make and deliver to your petitioner a deed for the same, which was done on the 22nd day of said month. That possession of said real estate was never delivered to the assignee but the said bankrupt continued in possession thereof although requested to deliver up the same to said assignee. That said bankrupt was in possession as aforesaid at the time of the sale and delivery of the deed to your petitioner and is still in possession of the greater part thereof, including said dwelling house, and although notified on the 6th day of August, 1878, to deliver up possession within ten days still remains in possession.

That since the adjudication of James Bryar, his wife, Jane Bryar, set up a claim to the undivided one-half of said real estate, and in conjunction with her husband remains in possession and refuses to deliver up possession to your petitioner, although it is her duty to do so under the law and order of sale. Wherefore your petitioner prays that an order be made commanding said James Bryar to deliver up possession of said real estate to him.

[Signed.] JAMES CAMPBELL.

Affidavit made August 23, 1878.

ORDER OF COURT.

"And now, August 23, 1878, a rule is granted on said James Bryar and Jane Bryar, his wife, to show cause why an order should not be made as prayed for. Returnable August 29, 1878."

Answer filed August 29, 1878, admitting sale of bankrupt's interest, but claiming title through S. B. McElroy to the undivided one-half of the said seven acres of land.

ORDER OF COURT.

"Now, August 29, 1878—argued C. A. V. Now, October 1st, 1878, rule absolute, without prejudice to any claim of title of Mrs. Bryar, wife of James Bryar."

PETITION OF EDWARD JAMES.

In the District Court of the United States, for the Western District of Pennsylvania.

In the matter of James Bryar, Bankrupt. } No. 2742, in Bankruptcy.

To the Honorable W. W. Ketcham, Judge of said Court.

The petition of Edward R. James of the city of Pittsburgh respectfully represents:

That he is a creditor of the said James Bryar by a certain mortgage dated October 1, 1874, and recorded October 2, 1874, in Mortgage Book, vol. 161, page 640, upon a certain tract of land in the 21st ward of the city of Pittsburgh, containing seven acres, particularly described in said mortgage; for the debt or sum of two thousand dollars ($2000.00) which with interest thereon from August 1, 1876, became due on the first day of October, 1876, and remains wholly unpaid.

Said mortgage is further conditioned that in case default should be made in the payment thereof for the period of sixty days, a writ of *scire facias* may at once be issued thereon and prosecuted to judgment and execution for the whole amount of said debt and interest, together with all fees, costs and expenses, &c., including an attorney's commission of five per centum. This mortgage and another of the same date, and recorded at the same time, given by said James Bryar to Thomas McClintock for $3000,00, with interest, etc., are the

first liens on the said seven acre tract, so mortgaged as aforesaid.

Your petitioner is wanting his money due on said mortgage.

Wherefore he prays your Honorable Court to allow him to proceed in the State courts to collect his said mortgage.

And he will ever pray, etc.

EDWARD R. JAMES.

City of Pittsburgh, ss.

Edward R. James, being duly sworn, saith that the facts set forth in his above petition are true, to the best of his knowledge and belief.

EDWARD R. JAMES.

Sworn to and subscribed before me this 29th day of March, 1878.

M. F. CASSIDY,
Alderman.

ORDER.

And now, to wit, March 30, 1878. The within petition presented. Whereupon the Court grants leave to the said Edward R. James to proceed in the State courts to collect his said mortgage.

PER CURIAM.

PORTIONS OF ACT OF 22 APRIL, 1856, P. L. 532.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by authority of the same*, That no exception in any Act of Assembly respecting the limitation of action in favor of persons *non compotes mentes*, imprisoned, *feme covert*, or minors, shall extend so as to permit any person to maintain any action for the recovery of any lands or tenements after thirty years shall have elapsed since the right of entry thereto accrued, to any person within the exception aforesaid: *Provided*, That

all persons who now have rights unbarred and who would be sooner barred by this section, shall not be thereby barred for five years from the date hereof.

SEC. 6. That no right of entry shall accrue or action be maintained for a specific performance of any contract for the sale of real estate, or for damages for non-compliance with any such contract, or to enforce any equity of redemption after re-entry made for any condition broken, or to enforce any implied or resulting trust as to realty, but within five years after such contract was made or such equity or trust accrued, with the right of entry, unless such contract shall give a longer time for its performance, or such contract, equity of redemption or trust shall have been acknowledged by writing to subsist by the party to be charged therewith within the said perrod, *Provided*, That as to any one effected with a trust by reason of his fraud, the said limitation shall begin to run only from the discovery thereof or when by reasonable diligence the party defrauded might have discovered the same; but no *bona fide* purchaser from him shall be affected thereby or deprived of the protection of the said limitation. *And, provided*, That any person who would be sooner barred by this section shall not be thereby barred for two years from the date hereof.

No. 227.
Sup. Ct. Campbell v. Barton
Q99

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SUPPLEMENTAL BRIEF EX-PARTE APPELLANTS.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Feb. 19, 1900.

NO. 227.

JAMES BRYAR, JR., EMMA S. BRYAR, SAMUEL B. BRYAR, EDWARD S. BRYAR, JENNIE H. BRYAR, HATTIE S. BRYAR and SUSAN BRYAR, Heirs-at Law of Jane Bryar, Deceased,

Appellants,

VERSUS

THOMAS CAMPBELL,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Third Circuit. No. March T. 1898.

Opinion by Butler, J.

Appeal by Plaintiffs from the Circ. Court West. Dist. of Pennsylvania. No. 30 Nov. Term 1879.

Opinion by Acheson, J.

Appeal by Defendant from the District Court of the Western Dist. of Pennsylvania. No. 17 May Term 1877.

Opinion by Ketcham, J.

EDWARD CAMPBELL,
LOWRIE C. BARTON,
Counsellors for Appellants.

—IN THE—

Supreme Court of the United States,

NO. 227 OCTOBER TERM, 1899.

JAMES BRYAR, Jr., et al., Heirs of JANE BRYAR, deceased, Appellants,

VERSUS

THOMAS CAMPBELL, Appellee.

SUPPLEMENTAL BRIEF EX-PARTE APPELLANTS.

The case of Bryar and wife against Beckett and others, upon which his Honor Judge Acheson based his decision in the Circuit Court below, in which decision Judge Acheson reverses the judgment of Judge Ketcham in the District Court, is reported in the Pittsburgh Legal Journal, Vol. 30, page 12, and is, as follows:

JAMES BRYAR et ux., in Right of the Wife, Plaintiffs Below, v. JOHN W. BECKETT et al.

SUPREME COURT OF PENNSYLVANIA.

Where one purchases land with knowledge of a secret equity in a third person, he may perfect his title by outstanding liens, and the fact that he had knowledge of the equity does not affect his title derived from a sale upon the liens purchased. Upon purchasing such liens he stands in the shoes of the lien creditor.

One who purchases land at an assignee's sale, subject to existing mortgages, is not bound to pay them off unless he expressly or by implication agrees to do so, and may secure his own title by purchasing them and proceeding to perfect his title under them.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

STATEMENT BY THE REPORTER.

This was an action of ejectment brought to recover the undivided half of a lot of seven acres of land in the Twenty-first ward, Pittsburgh. Both parties claim title through James McElroy, who died about 1837, intestate, leaving seven children, of whom Jane Bryar was one. In 1850 proceedings in partition were commenced in the Orphans' Court to divide the real estate of James McElroy. Purpart No. 6, containing seven acres and being the property in dispute, was chosen by John McElroy and allotted to him by the court. Jane Bryar under the partition proceedings was entitled to receive $2,528.73. For this sum Jane Bryar gave a receipt to S. B. McElroy and a release to that amount for the owelty, payable by S. B. McElroy in the partition proceedings. The receipt was given in March, 1852. John McElroy, by deed dated June 10, 1856, conveyed purpart No. 6, the property in dispute, to S. B. McElroy and James Bryar, husband of Jane Bryar, equally, as tenants in common, in fee simple. It appears that S. B. McElroy had not paid his sister wholly in money, the amount for which she had

given a receipt and release, but that the payment had been made partly by a note drawn by Eliza McElroy which was not paid. Finding that his sister Eliza was unable to pay the note, and desiring to secure Jane Bryar, S. B. McElroy suggested that Jane should take his undivided interest in purpart No. 6, in lieu of the note. To this she consented, and through her husband delivered the note of Eliza to S. B. McElroy, who in return executed and delivered a deed for his undivided one-half interest in purpart No. 6; not however, to Jane Bryar, but to her husband James. The surrender of the note was the consideration of the deed, and it is alleged to have been the intention to have had the deed made to Jane Bryar, and that the conveyance to her husband was a mistake. Within a year or so after the conveyance of S. B. McElroy, Bryar informed his wife that the deed had been made to him and was recorded, at which time she desired to have the title in herself, but the correction was never made. In 1874 James Bryar executed two mortgages on the property in dispute, one to Thomas McClintock for $3,900, the other to E. R. James for $2,000, and in 1878 the mortgages were foreclosed and judgment entered.

In January, 1877, James Bryar was adjudged a bankrupt, and the register in bankruptcy conveyed the property in dispute to Robert Arthurs, his assignee. The assignee proceeded to sell the interest of James Bryar in the seven acres in question, subject to the two mortgages heretofore mentioned, and conveyed the property to Thomas Campbell.

Prior to the sale a bill in equity had been filed in the United States District Court for the Western District of Pennsylvania by Jane Bryar, asking the court to restrain

the assignee from exercising control over her interest in the seven acres, of which proceeding Campbell had notice. The bill was afterwards amended. Jane Bryar was in the adjudication upon this bill in equity decreed by the District Court to be the equitable owner of the undivided one-half of the seven acres for which Thomas Campbell had received a conveyance. It was also therein decreed that he held the said one-half subject to the rights of Jane Bryar, and that he execute a deed to her for the said undivided half. This decree was appealed from by Thomas Campbell to the Circuit Court.

Wm. B. Rodgers, as the attorney for Campbell, then purchased the judgments obtained on the mortgages already mentioned, issued execution, sold the seven acres at sheriff's sale and bought the same for $50. The deed was made by the sheriff to Wm. B. Rodgers, who gave a written memorandum to Campbell, stating that he would convey to any one Campbell might wish, when requested so to do.

It was not disputed that Wm. B. Rodgers bought and held in trust for Campbell whatever title he obtained by the sheriff's deed.

The court of common pleas below, charged peremptorily for the defendants.

The position taken by the plaintiffs in error was that the undivided one-half, having been purchased with the money of Jane Bryar and conveyed to her husband by mistake, was held by him in trust for her, and Campbell having had notice of this equity took subject to it, and that the title obtained through the sheriff was void.

For plaintiffs in error, *Messrs. John N. McClowry, S. H. Geyer* and *A. N. Sutton.*

Contra, Messrs. Rodgers & Oliver and *Thomas M. Marshall.*

PER CURIAM. Filed November 14, 1881.

SHARSWOOD, C. J.

The fact that the mortgages of McClintock and James on the premises were valid liens, and the mortgagees entirely unaffected by any notice of the secret equity of Mrs. Bryar was undisputed, and the consequence necessarily followed that whether Campbell had notice or not he stood in their shoes when he purchased the title derived from them. It is contended, however, that Campbell having bought at the assignee's sale, subject to these mortgages, was bound to pay them off, and when he did so they were extinguished. But unless he expressly or by necessary implication agreed to pay them he was not bound to do so, and had an undoubted right to secure his own title by purchasing them and proceeding to perfect his title under them.

Judgment affirmed.

It is respectfully submitted to this court, that the per curiam opinion of the Supreme Court of Pennsylvania as delivered above, is not the law applicable to, and controlling the case before the court. The opinion of Chief Justice Sharswood, expressly says, that "unless he—Campbell—expressly or by necessary implication, agreed to pay them (the mortgages) he was not bound to do so."

The appellant cannot reconcile this decision with the facts of the case as then before the Supreme Court of Pennsylvania, which facts show the express assumption of the James and McClintock mortgages by Thomas Campbell when he accepted the assignee's deed to him.

BANKRUPTCY RECORD.

In the matter of the Bankruptcy of James Bryar } Western District of Pennsylvania, No. 2742.

PETITION.—Filed August 23rd, 1878.

To the Honorable the Judges of the District Court of the United States, Western District of Pennsylvania.

The petition of Thomas Campbell respectfully shows: That on the 8th day of January, 1877, James Bryar of the City of Pittsburg in said district was duly adjudged a bankrupt by this Court and Robert Arthurs was afterwards chosen assignee which choice was afterwards duly approved; That by the assignment to Robert Arthurs of the estate pursuant to Sec. 5044 of the Revised Statues there vested in said assignee the title of said bankrupt of and in (inter alia) certain real estate consist of about seven acres in 21st Ward Pittsburg, of which said bankrupt was then seized and claimed to be seized in fee simple and in severalty on which was erected the said bankrupt's dwelling house. That on the 4th day of May, 1878, pursuant to the order of this Honorable Court the said assignee sold at public auction to your petitioner the said real estate which sale upon report thereof made, was confirmed by your honors on the 21st day of said month and the assignee ordered to make and deliver to your petitioner a deed for the same, which was done on the 22nd day of said month. That possession of said real estate was never delivered to the assignee but the said bankrupt continued in possession thereof although requested to deliver up the same to said assignee. That said bankrupt was in possession as aforesaid at the time of the sale and delivery of

the deed to your petitioner and is still in possession of the greater part thereof including said dwelling house and although notified on the 6th day of August, 1878, to deliver up possession within ten days still remains in possession.

That since the adjudication of the said James Bryar, as a bankrupt, his wife, Jane Bryar, set up a claim to the undivided one-half of said real estate and in conjunction with her husband remains in possession and refuses to deliver up possession to your petitioner although it is her duty to do so under the law and order of sale. Wherefore your petitioner prays that an order be made commanding said James Bryar to deliver up possession of said real estate to him.

[Signed]: THOMAS CAMPBELL.

Affidavit made August 23, 1878.

ORDER OF COURT.

"And now August 23, 1878, a rule is granted on said James Bryar and Jane Bryar, his wife, to show cause why an order should not be made as prayed for. Returnable Aug. 29, 1878."

Answer filed August 29, 1878, admitting sale of bankrupt's interest but claiming title through S. B. McElroy to the undivided one-half of the said seven acres of land.

ORDER OF COURT.

"Now Aug. 29, 1878—Argued C. A. V.—Now Oct. 1st, 1878, Rule absolute without prejudice to any claim of title of Mrs. Bryar, wife of James Bryar."

Simply for the sake of clearness, and grouping together

the facts of the case in a brief space, the opinion of Judge Butler is here reprinted with the insertion therein of some dates and items to which his Honor alludes, but which he does not fully set forth.

CIRCUIT COURT OF APPEALS RECORD.

In the United States Circuit Court of Appeals for the Third Circuit.

JAMES BRYAR, JR., ET. AL., Heirs of Jane Bryar, Deceased, Appellants
vs.
THOMAS CAMPBELL, appellee

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Before Dallas, Butler and Kirkpatrick, JJ.

BUTLER, *District Judge:* Dec. 5th-1898

In January, 1877, James Bryar was declared a bankrupt, and soon thereafter certain land to which he had title was offered for sale by his assignee. His wife, Jane Bryar, thereupon petitioned the District Court (by Bill in Equity) for an order to restrain the sale, averring that the property was hers, the deed for the same having been made to her husband by mistake. While the application was pending viz, May 4th, 1878, the assignee sold the land to Campbell. Subsequently (June 29, '78) Campbell was brought in as a defendant, and later (June, '79) the petition was amended by inserting a prayer for conveyance of the land by Campbell to the petitioner. Thus the proceeding became substantially a suit between Mrs. Bryar and Campbell for the prop-

erty in controversy. Subsequently viz, June 26th, 1879, the court adjudged it to her and decreed that Campbell convey accordingly. July 16, '79, the latter appealed to the Circuit Court. While the appeal was pending viz, Sept. 20th, 1879, the land was sold under a mortgage executed by James Bryar October 2, 1874, and purchased by William B. Rodgers who conveyed to Campbell. In 1880 Mrs. Bryar brought an action of ejectment (in the Commom Pleas of Allegheny county, Penna.) against Campbell, and on the trial a verdict was rendered against her and judgment entered accordingly. January 28, 1896, the plaintiff moved the United States Circuit Court to dismiss the appeal (for imperfection); which motion the court refused. With these facts appearing on the record the appeal came to a hearing in 1897 and the bill was dismissed. The refusal to strike off the appeal and the dismissal of the bill constitute the errors assigned.

The case is extraordinary; but in any view that can be taken of it the action of the Circuit Court (in both respects complained of) must be affirmed. Granting that the District Court had jurisdiction to enter the decree (which may well be doubted, to say the least), and that the Circuit Court had authority to do more than reverse and dismiss the bill, for want of such jurisdiction, its refusal of the motion and dismissal of the bill on the merits must be affirmed, because, first, the suit at law must be treated as an abandonment of the proceeding in equity, and, second (if not), the verdict of the jury must be regarded as a conclusive finding of the facts, on which the plaintiff's case rests, against her.

The decree is therefore affirmed.

No. 227.
Brf. of Campbell & Barton for App'ts.
MAR 10 1900
JAMES H. McKENNEY,
Clerk.

Appellants' Brief of Authorities.

BRYAR'S HEIRS,

Filed Mar. 10, 1900.

APPELLANTS,

vs.

CAMPBELL,

APPELLEE.

Supreme Court of the United States,

OCTOBER TERM, 1899,

NO. 227.

Appeal from the Circuit Court of Appeals, Third Circuit.

EDWARD CAMPBELL,
LOWRIE C. BARTON,
Appellants' Attorneys.

17,317.

—IN THE—

Supreme Court of the United States,

NO. 227 OCTOBER TERM, 1899.

BRYAR'S HEIRS

VS.

CAMPBELL.

BRIEF OF APPELLANTS' AUTHORITIES.

If the Common Pleas ejectment involved the same title so as to be an estoppel to the United States District court litigation, the rule must work both ways and the Common Pleas judgment must be a nullity by reason of want of jurisdiction, the District court having been in exclusive possession of the cause before it was carried to the Common Pleas.

If the Common Pleas judgment did not involve the same title as that litigated in the United States District court, but involved only the James title, which the appellee's counsel now contends, came into existence *after* the United States District court final adjudication, then the Common Pleas decision was not an adjudication of the District court cause of action, and the action of the Circuit court in holding it a bar to the District court suit, was error. No matter how good a title the James title might be, it could not rightfully affect

the District court adjudication; it was not in existence when the District court adjudication was made, and could not be entitled to more effect than an outstanding title never offered in evidence.

If his Honor Judge Acheson, is correct in his conclusion, that the subject-matter of the action of ejectment in the Allegheny county Common Pleas, is identical with the subject-matter now in hearing, so as to come within the rules of *res judicata*, then, because the same matter had been finally adjudicated by the District court of the United States, the Common Pleas judgment is null and void, incapable of ratification, and must be so held and treated, whenever and wherever and for whatever purpose it is sought to be used or relied on as a valid judgment. This is said by the text writers to be a "familiar and universal rule." It has been often recognized and never repudiated by the courts.

1 Black on Judgments, bottom p. 265 § 218.

1 Black on Judgments, bottom p. 291 § 240.

Brown on Jurisdiction, p. 106 § 40 note 1.

1 Freeman on Judgments (4th Ed.) p. 181 § 118 a.

1 Foster Fed. Pr. p. 14 note 15.

1 Foster Fed. Pr. p. 347 note 7.

Covell vs. Heyman 111 U. S. 176—4 Sup. Ct. R. 355.

Heidritter vs. Elizabeth O. Co. 112 U. S. 294–5 Sup. Court Rep. 135–139.

Mansfield Ry. Co. vs. Swan 111 U. S. 379.

St. Louis R. vs. Walthers 134 U. S. 41.

Kansas City & T. R. vs. I. L. Co. 37 Fed. Rep. 3.

Int. C. & I. Co. vs. Gibney 160 U. S. 217.

Borden vs. Fitch 15 Johns, 141.

The decree of the United States District court, in this case, of June 26 1879, adjudging the title to the land in dispute, to be in Jane Bryar, and decreeing that the appellee, Thomas Campbell, execute a deed for the same to her, is, under the foregoing authorities, unassailable, final, and in full force at present, unaffected in any respect, by the "vain, nugatory and void" (Heidritter vs. Elizabeth &c. 112 U. S. 294) procedure of the Court of Common Pleas of Allegheny county, and the Supreme Court of Pennsylvania, in the premises.

"The line which separates error in judgment, from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, and may be declared a nullity *collaterally*, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity, in the other mere waste paper; there can be no middle character assigned to judicial proceedings, which are irreversible for error."

Herman on Estoppel and Res. Judicata, vol. I page 443, Sec. 380.

Voorhees vs. Bank 10 Peters 449.

"If two courts have concurrent jurisdiction, that which first attaches is exclusive, AND CANNOT BE SUBSEQUENTLY DEFEATED."

Wallace vs. McConnell 13 Pet. 136.

Taylor vs. Carryl 20 Howard 583.

Mallett vs. Dexter 1 Curt. 178.

"The rule, that where the court in which any proceed-

ing is instituted, has no jurisdiction of the subject-matter, the proper course is to dismiss the suit or proceeding, without rendering any judgment, is confined to those cases where the want of jurisdiction appears upon the face of the proceedings."

Gormley vs. McIntosh, 22 Barb. (N. Y.) 271.

"Where it does so appear, and the cause goes to a superior court upon appeal, the want of jurisdiction is equally fatal there, and the superior court will render such judgment as should have been rendered in the court below." Ib.

"Consent may give a court jurisdiction of parties to an action, but not of the subject-matter. Brady vs. Richardson 18 Ind. I, Overstreet vs. Brown 4 McCord (S. C.) 79; Campbell vs. Cowden, Wright (Ohio) 484; Cleveland vs. Welsh, 4 Mass. 593; Harrison vs. Rowan, Pet. C. Ct. 489; Walker vs. Rogan I Wis. 597; Hills vs. Miles. 13 Wis. 625; Clyde &c. Plank Road Co. vs. Parker 22 Barb. (N. Y.) 323.

"It was argued that the court had no jurisdiction to entertain the bill unless there were good judgments, and that no admission or consent could confer jurisdiction—HELD—that the principle as to consent applied only to the question of general jurisdiction to adjudicate as to the subject-matter, and not as to the question whether the particular facts of the case brought it within that conceded general jurisdiction; consent cannot confer jurisdiction *to hear a case*, but if, as made by the complaint, it is one proper for the court to hear, admissions are sufficient ground to influence it in granting or refusing the relief asked."

Wanser vs. Howland, 10 Wis. 8.

"The proceedings of any tribunal, not having jurisdiction of the subject-matter which it professes to decide, are void."

Wickes vs. Caulk, 5 Har. & J. (Md.) 42.

Griffith vs. Frazier, 8 Cranch, 9.

Denn vs. Harnden, 1 Paine, 55.

Collamar vs. Page, 35 Vt. 387.

"After a court has once been vested with jurisdiction of a cause, the sale of the claim to a third party does not operate to divest the jurisdiction." 1870.

Blake vs. Bank of Louisana, 22 La. Ann. 572.

"A court once having acquired jurisdiction of a cause should retain it." 1858.

West vs. Morris, 2 Disney (Ohio) 415.

"The jurisdiction of any court, over either the person or the subject-matter, may be inquired into whenever any right or benefit is claimed under its proceedings." 1865.

Gray vs. Larrimore, 2 Abb. U. S. 542.

Freeman on Judgments, Fourth Ed. Vol. 1, page 181, § 118, a, explains the matter thus: "It may happen that while an action is pending over the subject-matter and parties of which the court has jurisdiction, another action is commenced, to which the same persons are parties, in another court, involving the same subject-matter, and it may further happen that both actions proceed to judgment, and that the judgments are wholly irreconcilable. If so, then the question arises, To which shall be given precedence? The authorities agree that when a court has obtained jurisdiction over an action, it is entitled to pursue such jurisdiction to final judgment, and that, its jurisdiction cannot be divested by the

bringing of another action in a court of current jurisdiction, and that, notwithstanding the bringing of a second action, the court first acquiring jurisdiction will not hesitate to proceed, irrespective of what may be done in the other action by the other court. So far as we are aware, no instance has ever occurred in which the court last acquiring jurisdiction has proceeded to judgment and sought to enforce such judgment notwithstanding the pendency of the prior action. Generally, the conflict of jurisdiction is avoided by suggesting to the second court the fact that another court had previously acquired jurisdiction of the controversy, and that, to avoid any unseemly conflict, the trial of the second action should be stayed until the first is disposed of; and in some instances, parties instituting the second action have been enjoined from its further prosecution. Still, it may happen that when one of the national courts has acquired jurisdiction of an action, one of the parties thereto may thereafter resort to a state court and there commence an action against his adversary, involving the subject-matter, and thus attempt to transfer the controversy to the state courts; and the latter may, notwithstanding any objections made, insist upon proceeding to trial and judgment. In this event will its judgment be valid, or not? This question seemed about to arise in a very celebrated case, (Sharon vs. Sharon 79 California 633) but its decision was finally rendered unnecessary by the reversal of the judgment of the state court. So far as any opinion was expressed upon the subject in this case, the courts of the state of California inclined to the view that their judgment was void, while the national courts, on the other hand, were obviously determined, if necessary, to en-

tirely disregard it. It seems impossible that two courts can, at the same time, possess the power to make a final determination of the same controversy between the same parties. If either has authority to act, its action *must necessarily be exclusive*, and therefore it is our judgment that whenever either the state or the national courts acquire jurisdiction of an action and the parties thereto, this jurisdiction cannot be destroyed, diminished, or suspended by one of the parties bringing an action in another court, and that any judgment or order of the latter court *is void*, so far as it conflicts with any judgment or order of the court first acquiring jurisdiction."

In Green vs. Rick 121 Pa. page 130, Mr. Justice Clark says, page 140–141, as follows:

"The whole doctrine of *lis pendens*, in this country, is said to be founded upon the opinion of Chancellor Kent in Murry vs. Ballou, 1 Johns Ch. 566: "The established rule, says the chancellor, is that a lis pendens, duly prosecuted and not collusive, is notice to a purchaser so as to effect and bind his interest by the decree, and the lis pendens begins from the service of the subpoena after the bill is filed. Where a purchase is made of property actually in litigation, pendente lite, upon a valuable consideration, and without express or implied notice, in point of fact, the purchaser is affected in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit: Story's Eq. J. §405. The principle applies generally, in suits brought in law or equity for the purpose of determining the title to real property: Hersey vs. Turbett 27 Pa. 418; but it is not confined to actions involving title

to realty. It is applicable in certain cases involving the title to choses in action, excepting commercial paper not due. In Diamond vs. Lawrence Co., 37 Pa. 353, it is held, that the pendency of a suit between a county and a railroad company, in regard to bonds issued by the county in payment of its subscription to the stock of the company, is notice to all the world of the facts alleged in the pleadings therein. Also, in Murry vs. Lylburn, 2 Johns. Ch. 441, the principle was held to apply to choses in action, as well as to real estate, and to entitle a cestui que trust, whose land has been fraudulently disposed of by the trustee during the pendency of a suit brought against him, not merely to the land itself, but to the mortgages or other securities taken for the purchase money, against purchasers or assignees claiming title thereto, as well as the assignments made whilst the suit was pending. If, therefore, Rick had sold this bond and mortgage to the building association, pending the proceedings on the bill in equity, the principle of lis pendens would apply without doubt; but we are not aware that the doctrine has ever been carried to cases where the party to be affected by it was not strictly a purchaser, pendente lite, of the property in litigation. See Wade on Notice, 360."

In the case of Shyhoof against Fliteraft 1 Ashmead page 171, the syllabus reads as follows, viz:

"Where there exist two tribunals possessing concurrent and complete jurisdiction, the jurisdiction of that tribunal is exclusive which has first possession of the subject-matter of controversy."

King, President J. says: "I hold it to be a clear principal of jurisprudence, that when there exist two tribunals

possessing concurrent and complete jurisdiction of any question, that the jurisdiction of that tribunal, is exclusive which has first possession of the subject-matter in controversy." * * * *

* * * * Nothing would be more indecorous and disparaging to the administration of justice, than the racing for jurisdiction which would perpetually take place between justices ot the peace, if the course of precedure adopted in this case, is sanctioned by this court. The law does not, however, countenance it, but gives exclusive jurisdiction to the first justice, and consequently, any subsequent interference of another justice is illegal, and any judgment given by him between the parties, void for want of jurisdiction."

In the case of Frankel 1 vs. Satterfield, Superior Court of Delaware, 19 Atlantic Reporter page 898, Grubb J. says on page 900–901:

"Where a judgment of a domestic court of record of general jurisdiction is void for want of jurisdiction apparent upon the record, it is, in legal effect, no judgment. In legal contemplation it has never had lawful existence. By it no rights are divested. From it no right can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. It cannot be the basis of an execution, or the foundation of a valid title to property purchased at a sale thereunder. No action on the part of the plaintiff, no inaction on the part of the defendant, can invest it with any of the elements of power or of vitality. It is unavailing for any purpose. It can be taken advantage of at any time, and in

any court where it is offered as a conclucive adjudication between the parties; for an inspection shows that it is not such, because the court had no power, for manifest want of jurisdiction. Such a judgment, when collaterally drawn in question, may be disregarded and treated as a nullity, and need not be adjudged to be such by a formal and direct proceeding for its vacation or reversal.

Folger vs. Slaughter, 33 La. Ann. 342.
Bledsoe vs. Erwin Id. 618.
Settlemeir vs. Sullivan 97 U. S. 444.
Eaton vs. Badger, 33 N. H. 228.
Green vs. Clawson, 5 Houst. 159.
Wall vs. Wall 123 Pa. St. 545. 16 Atl. Rep. 598.
Freem. Judgm. § 117.

This doctrine has been recognized repeatedly in actions of trespass, ejectment, debt on judgments, and other collateral proceedings, wherein such judgments have been drawn in question." * * * *

* * * * If the record produced shows that the court did not have jurisdiction of either the person of the defendant or the subject of the controversy, it must be disregarded, and the plea sustained; for, in such case, "there is no valid record upon which a recovery can be had, and, consequently, there is no such record as the plaintiff has set out in his declaration."

In the case of Taylor vs. Carryl 24 Pa. page 259, the syllabus reads as follows:

"1. A writ of foreign attachment issued from the Supreme Court of Pennsylvania, and first laid upon a vessel,

was not divested by a subsequent proceeding in rem in the United States Admiralty Court for mariner's wages.

"2. The mariners might have submitted to the State Court their claim to payment out of the proceeds of sale made subsequent to their proceeding in admiralty, their claims against the vessel being discharged by such sale, which was not made specially subject to their claims; and they might have intervened in the State Court for the protection of their interests.

"3. Either of the said Courts, by amicable arrangement between them, might have directed a sale of the vessel and payment of the mariner's claims; and the surplus might have been retained, or ordered into the other Court for further distribution."

Mr. Justice Lowrie says, page 269:

"From all this it seems to follow that the arrest for the sailors, depended for its efficacy upon a contingency that never happened. The proceedings in the State Court totally exhausted the subject-matter of their contingent seizure, and prevented it from ever reaching the District Court. Its decree was therefore in relation to a subject over which it had no control, *and was consequently void.*"

"A vessel was seized under a writ of foreign attachment issued from a court of the state of Pennsylvania, and while a motion for the sale of the vessel was pending in that court, a libel was filed in the district court of the United States, for wages due the seamen, process issued under it, and a sale was made by order of the district court. HELD that the district court *had no jurisdiction* over the vessel when its order for sale was made, and that the sale of the marshall

was inoperative. To give jurisdiction in rem, there must have been a valid seizure and an actual control of the ship by the marshall of the court; and this was not the case, inasmuch as the vessel was already in the actual and legal possession of the sheriff, under process from the state court."

Taylor vs. Carryl 20, How. 583.

"In the case of conflicting authorities under a state and federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail, does not depend upon the rights of the respective parties, to the property seized, whether the one was paramount to the other, *but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process.*" Freeman vs. Howe, 24, How. 450.

"To give jurisdiction in rem, the seizure by the marshall must have been valid; and this is not the case where the vessel was at the time of seizure, in the actual and legal possession of a sheriff, under process issued from a state court."

Taylor vs. Carryl 20 How. 583.

The Gazelle, 1 Sprague 378.

The Julia Ann Id. 382.

"A sale of property under a proceeding in rem, as, for instance, a suit to enforce a mechanic's lien, instituted in a State court pending a proceeding in a Federal court to enforce a forfeiture of the property for violation of the revenue law, *passes no title to the purchaser;* and this is so, although the sale in the lien proceeding, is not made until after the property has passed from the possession of the Federal court

by delivery to the purchaser at the sale had in the forfeiture proceeding."

Heidritter vs. Elizabeth Oil Co. 112 U. S. 294.

In the case of Collins vs. Collins 37 Pa. page 387, the opinion of the court was delivered January 7, 1861, by Woodward, J.—"If the justice had not jurisdiction of the cause of action, the appeal was properly dismissed, even at the late hour at which the judge turned it out of court. It had better been dismissed before trial and verdict, but it is *never too late* in the progress of a cause to take advantage of the want of jurisdiction. It is urged on the authority of Lauchner vs. Rex, 8 Harris 469, that the defendant having submitted to a trial, and taken the chances of a verdict in his favor, cannot be admitted, after he finds himself defeated, to object to the jurisdiction. * * * *

* * * * *The defendant may object on that ground at any time.* Regularly, he ought to do it at the earliest possible moment; but laches, no more than consent, can confer jurisdiction, and therefore we cannot deprive the defendant of the benefit of his objection, late and untimely as it was."

"A state court having gained a prior jurisdiction by service of process, is not deprived thereof by actual seizure of the property by the officer of the U. S. court having concurrent jurisdiction."

Owens vs. Ohio Central R. R. Co., 20 Fed. Rep. 10.

"If a state and federal court have concurrent jurisdiction of the subject-matter of a suit, the court in which legal proceedings are first instituted acquires jurisdiction, to the exclusion of the other court."

Parks vs. Wilcox, 6 Col. 489.

"Objection to the jurisdiction of the person may be waived by the act of the party; want of jurisdiction of the subject-matter is never thus waived." (Following 26, N. H. 232 1872.)

Damp vs. Dane 29, Wis. 419.

State vs. Tappan, Id. 664.

"Jurisdiction cannot be conferred by consent of parties."

Cerro Gordo County vs. Wright County, 59 Iowa 485.

"Want of jurisdiction of the subject-matter cannot be waived by consent of parties."

Brondberg vs. Babbott, 14 Neb. 517.

"The institution of a suit in a court that has no jurisdiction is null; and the subsequent investiture of jurisdiction will not cure the nullity.

1869—Mora vs. Kuzac, 21 La. Ann. 754."

"Pending proceedings in a State court by a national bank, to foreclose a mortgage, executed to it by A. and duly recorded, B., his creditor, recovered against him in the U. S. circuit court a judgment which, by the lex loci, was a lien on the equity of redemption. B. then filed his bill in the latter court against A. and the bank to set aside the mortgage as illegal, or to have certain alleged payments of usurious interest applied to reduce the debt. Shortly thereafter, the State court rendered a decree of foreclosure and sale, which the bank set up in its answer to the bill. The circuit court thereupon dismissed the bill.

HELD: 1.—That the state court having first acquired jurisdiction of the subject-matter, its decree was a bar to the further prosecution of the suit against A. and the bank.

2.—That A. represented all the parties who, pending the foreclosure proceedings, acquired through him an interest in or a charge on the mortgaged land, and that B., although not a party to them, was bound by the decree therein rendered."

Stout vs. Lye, 103 U. S. 66.

"A court which has once rightfully obtained jurisdiction of the parties may retain it until complete relief is afforded within the general scope of the subject-matter of the suit."

Ward vs. Todd, 103 U. S. 327.

"Jurisdiction over the subject-matter of a suit cannot be conferred by consent, nor can the right to object for want of it be lost by acquiescence or neglect."

School Trustees vs. Stocker 42 N. J. L. 115.

"Where the jurisdiction of a court has once vested, it cannot be ousted by subsequent events."

Estes vs. Martin 34, Ark. 410.

"Justice requires that every cause be once fairly and impartially tried; but the public tranquility demands, that, having been once so tried, all litigation of that question, and between those parties, should be closed forever."

1 Greenleaf on Ev. (12th Ed.) page 559, section 522.

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COUNTER STATEMENT.

The controversy here is as to the undivided one-half of seven acres of land in the city of Pittsburgh. The title to the land was in James Bryar (the husband of Jane Bryar) and S. B. McElroy. McElroy conveyed his undivided one-half to James Bryar by deed, dated 10th June, 1856, and this deed was promptly recorded. James Bryar was adjudged a bankrupt on 8th January, 1877, and the land appeared in his schedules as belonging to him. Three months after his adjudication Jane Bryar, his wife, set up a claim that the name of her husband, as grantee in the McElroy deed made twenty-one years before, was a mistake, and that it should have been made to her. The first intimation of this was in a bill filed on that date by her in the District Court against her husband and his assignee, in which she asked that the assignee be restrained from exercising control over her land, or selling the same (Record 3, 4). Something over two years from that date, viz, 25th June, 1879, she was allowed to amend her prayers, so as to ask for a conveyance to her of the undivided one-half of the land.

The land was sold at assignee's sale as the property of James Bryar on the 4th May, 1878, and purchased by Thomas Campbell, the appellee here. Finding the bill was being proceeded with and testimony being taken, Campbell intervened on 15th August, 1878. As already stated, Mrs. Bryar was allowed on 25th June, 1879, to amend her prayers so as to ask for a conveyance of the

land. This amendment was without notice, and the next day a decree was entered directing Campbell to convey to Mrs. Bryar the undivided one-half of the land.

On 30th June, 1879, Campbell appealed to the Circuit Court. His bond for costs was filed in the District Court on that day, and on 30th August, 1879, his petition for appeal, the decree, the docket entries in the District Court and his bond on appeal were certified into the Circuit Court.

The particular attention of the Court is now requested to certain additional facts.

James Bryar, being the owner, as per the record, of the whole seven acres, had on 1st Oct., 1874, mortgaged the the same to E. R. James, to secure a debt of $2,000, and to Thos. McClintock to secure another debt of $3,000. Bryar defaulted in the payment of these mortgages. Writs of Scire Facias were issued on both. A Levari Facias was issued on the James Mortgage, and the property was sold thereon to W. B. Rodgers, and a Sheriff's deed made to him on 20th September, 1879. Mr. Rodgers, shortly previous to the sale, had purchased the mortgages to protect Campbell, and at the Sheriff's Sale purchased for him. Shortly after the sale Rodgers conveyed the property to Campbell, and the latter went into possession and put a tenant on the premises. *It will be observed that this title was obtained by Campbell after the decree of the District Court and after the appeal.*

Within four months after the Sheriff's Sale viz : January, 1880, Mrs. Bryar brought an Ejectment in the Court of Common Pleas No. 1 of Allegheny County (where the land is situated) against Thos. Campbell, Becket, his tenent, and W. B. Rodgers to recover the same undivided interest in the same land as referred to in her bill in he District Court.

In that ejectment Mrs. Bryar set up in her abstract of title and proofs the same equitable title which was the foundation of her bill in the District Court. Campbell, in his abstract and proofs claimed to have taken the title of the mortgagee, and as the mortgagee had no notice of Mrs. Bryar's claim, therefore his title under the Sheriff's Sale was free from any equity on the part of Mrs. Bryar. That case resulted in a verdict for the defendants. Mrs. Bryar then took an appeal to the Supreme Court of Pennsylvania and the judgment was affirmed by that Court in November, 1881, in an opinion, a copy of which will be found in the Appendix to this book.

This decision of the Supreme Court was acquiesced in, and no move was made in the Circuit Court for over fourteen years. But in December, 1895, a motion was made in the Circuit Court on behalf of Appellants for an order decreeing the appeal deserted for the reasons that Campbell had "failed to bring up the record from the said District Court, pay the entry costs in this Court, or to prosecute their appeal to the next term of this Court." (Record 28).

Campbell filed an answer setting out that he had acquired a title to the land after the decree, and the proceedings in the State Courts as stated above, and assigning those facts as his reason for not prosecuting his appeal, but that if necessary, asking leave to take testimony as to the facts. The Court allowed Campbell to take this testimony.

By stipulation filed in the Circuit Court on 28th January, 1897, it was agreed that a substitution, previously made of the heirs of Jane Bryar, as plaintiffs, be taken and considered as a Bill of Revivor; that Campbell's answer to the motion to decree the appeal deserted be taken as a cross bill, and that the case be heard upon the record before the Court (including the testi-

mony taken in the Circuit Court). This stipulation is not printed in the Record, but is printed in the Appendix to this book and appears in substance in the docket entries in this Record, p. 1-2. The Court after argument, entered a decree reversing the decree in the District Court and dismissing the bill.

By agreement of Counsel the paper books on both sides in the ejectment case were to be used in the Circuit Court, and for the abstracts of title, testimony points and all other matters, reference was to be had to the paper books (see this Record p. 32-33). None of the contents of these paper books appear in this Record, but the books themselves will, if necessary be produced on the argument of this case.

ARGUMENT.

1. From the statement of the facts, as given in the Counter Statement, the Court will see why Campbell took no further proceedings in his appeal at the time.

In January, 1880, during the term of the Circuit Court next after the appeal, and within four months from the date of the decree, Mrs. Bryar brought her Ejectment against him in the State Court, claiming to recover the same interest in the same land, and by the same equitable title, as set forth in her bill. Compbell was compelled to defend in that jurisdiction. He had no option in the matter. He could not set up as a defense the pendancy of the Bill in Equity in the Circuit Court.

Smith vs. Lathrop, 44 Pa. 326.

Stanton vs. Embry, 93 U. S. 548-554 and cases there cited.

The case was tried and resulted in a verdict and judgment for Campbell. Mrs. Bryar then took an appeal to the Supreme Court of Pennsylvania and the judgment was affirmed by that Court in November, 1881. Bryar vs. Beckett et al., 13 Pgh. L. J. N. S. 12. (See opinion, Appendix, pp. 1 and 2 this book). From that time until Jany. 1896 (when the attempt was made to revive the proceeding in the Circuit Court) the judgment of the Supreme Court was considered as an end of all controversy. Mrs. Bryar lived for nine years after that judgment and she apparently never thought that she

could take Campbell into the State Court, and litigate with him there, and if successful there take the land from him, but if unsuccessful, fall back on the bill in equity, and by it, take the land. Nor did her heirs have any such thought for six years after her death.

In the meantime the property had been subdivided into lots, which have been sold over and over again, and improved by the purchasers in reliance upon the judgment of the Supreme Court of Pennsylvania.

Mrs. Bryar abandoned her bill when she went into the State Court. She could not vex Campbell with two suits for the same cause of action, prosecuted in two different jurisdictions at the same time. For some reason she chose to proceed in the State Court and continued there until she procured the final judgment of the highest Court of the State. No one can doubt that Campbell, being pursued by Mrs. Bryar in the State Court, had at least good reason to suppose that Mrs Bryar had elected to desert her first suit. Therefore, his omission to take further action in the appeal in the Circuit Court was excusable.

Grigsby vs. Purcell, 99 U. S., 506.

And in any aspect of the case the Circuit Court did justice when the facts were properly brought before it by bill of revivor, cross bill and proofs, in concluding that Campbell should not be allowed to suffer.

Moreover, abandonment of the bill by Mrs. Bryar is to be conclusively presumed as against her and her heirs by reason of her and their long acquiescence and laches. Campbell was in possession. His title was declared by the Supreme Court to be a paramount title, and she or her heirs never made a move to assert any claim under the decree for over fourteen years.

Waring Bros. & Co. vs. Pa. R. R. Co., 176 Pa., 172.
Biddle vs. Bank, 109 Pa., 349.

But it is said now that the State Court did not have jurisdiction. The State Courts have jurisdiction in actions of ejectment. If the position on the other side be that the State Courts could not try this particular case, the answer is, where the objection is to the power of the court to try the particular case and not to its power to try cases of the same general character the objection may be waived.

Fennell vs. Guffy, 155 Pa., 38.

Again, under Campbell's defense as set up in the ejectment, the case turned on the after acquired title, under the sheriff's sale on the James mortgage. We cannot conceive how either party could compel the other to litigate that question in the United States Courts under the bill in equity.

It cannot be possible that Appellants argue seriously when they say that the decree in equity was res judicata, and therefore the State Courts had no jurisdiction. Conceding, for argument, to the decree, all the efficacy claimed—that is, that it had the same effect as a judgment at law on an equitable title—it is a sufficient answer to say that it was never heard of; that when there was such a decree that the parties could *never* litigate again in relation to the subject matter, on an after acquired title, not involved in the former case.

Again it is argued, that the decision of the Supreme Court of Pennsylvania was wrong. In Forsyth vs. Hammond, 166 U. S. 517, this Court said: "The questions both of error and jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any

other tribunal to collaterly deny the validity thereof? Does not the principle of res judicata apply in all its force? * * The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other form."

There is no question here as to a resulting trust, nor as to subrogation. The simple question upon which the decision in the ejectment case of Bryar vs. Beckett et al. was based, was as to whether Campbell was or was not entitled to the rights of a bona fide purchaser under the sale on the James Mortgage. As stated, there were two mortgages on the land, both made by James Bryar—one to E. R James and the other to McClintock. It was shown on the trial of the ejectment, and has always been conceded, that these mortgagees had no notice of Mrs. Bryar's equity.

In Bracken vs. Miller, 4 W. &. S., 102, Judge Grier, then sitting in the District Court of Allegheny county, was affirmed, the Court saying, "The rule being well settled that if the first purchaser had no notice, a second purchaser from him holds the land discharged of a trust, even though such second purchaser had notice of it. Harrison vs. Forth (Prec. Ch. 51), Brandlyn vs. Ord (1 Atk., 571), Sweet vs. Southcote (2 Bro. Rep., 66), Fonb Eq. 147."

A mortgagee is a purchaser within the recording acts. Ernest vs. Culbertson, 6 Weekly Notes Cases, 199.

Campbell bought at assignee's sale "subject to the payment of said mortgages," or "subject to the first mortgages."

This did not require him to pay these mortgages. There was no personal duty or obligation of payment.

It was discretionary with him whether he should stand on the equity of redemption which he had purchased, or go farther and perfect his equity into a legal title. This is what is decided by the Supreme Court of Pennsylvania in the ejectment of Bryar vs. Beckett, et al., *supra.*

Campbell's covenant was again before the Supreme Court of Pennsylvania in Bryar's Appeal, 111 Pa., 81, which was a case where Mrs. Bryar after the determination of her ejectment, filed her bill for dower in the same land. A copy of the opinion in that case will be found in appendix to this book. The Court there says, "By the purchase at the assignee's sale Campbell obtained Bryar's equity of redemption, and as respects him nothing more. He bought the land subject to the mortgages, and there is no way that he could hold the land under that purchase and compel Bryar to pay the whole or a part of the debt. His bid was in addition to the debts secured by the mortgages. He contracted no personal liability, and was at liberty to suffer the mortgagees to cause the land to be sold at judicial sale, in which case he could have bought it himself." And again, "Campbell had an interest in preserving the mortgages until after foreclosure and sale, for the purchaser at such sale would take as good title as the mortgagor appeared to have. If the mortgagee had no knowledge of an adverse title he had a right to perfect his title if he could, but he was not bound to buy the property if another should bid a larger sum than he cared to pay. The question is not whether he could purchase the mortgage and use it to compel the debtor to pay it, but whether he can use it to protect himself against adverse claims which could not avail against the mortgagee or any one holding under him. At the Sheriff's Sale upon the judgment on the mortgage all persons were as free to bid as if there had been no sale by the Assignee, and the purchaser took title under the mortgagee. It was said by the late Chief Justice that Campbell, unless he expressly or by necessary impli-

cation agreed to pay the mortgages, had an undoubted right to secure his own title by purchasing them and proceeding to perfect his title under them. Bryar, et ux. vs. Beckett, et al., 13 Pgh. L. J. N. S. 12."

All that Campbell contended for in the Circuit Court was that he should be allowed to bring before the Court all the facts in the case, and under the circumstances it was no more than justice that he should be allowed to do so. This the Circuit Court allowed him to do. The proofs in the District Court as well as those taken in the Circuit Court, are all upon this record. Those taken in the Circuit Court refer only to the facts which transpired after the decree and appeal were taken, and they were properly raised by the cross bill of Thomas Campbell, (see stipulation of 28th January, 1897, appendix). Thus that Court had before it every fact necessary to decide the case.

If the matter of defence arises after the cause is at issue, as if there has been a release or an award, that and similar defences are properly made by cross bill.

Story's Equity Pleading, Section 293.

The appeal, as in admiralty cases, carried the whole cause into the Circuit Court to be proceeded in there upon new pleadings and additional proofs if necessary or advisable. The suit might have been brought in the Circuit Court originally, Revised Statutes, Sec. 4979. In addition, the Circuit Courts have a general superintendence and jurisdiction of all cases arising in the District Court when sitting as a Court of Bankruptcy, and except when special provision is otherwise made may, upon bill, petition or other process of any party aggrieved hear and determine the same as in a Court of Equity. Sec. 4986.

II. Appellants controvert the opinion of the Court of Appeals as to there being at least a doubt as to the juris-

diction of the District Court. It was not necessary for the decision of the case for that Court to go farther than the suggestion.

Our position on this point is this: Whatever may have been the rights of Mrs. Bryar as against the Assignee, or those of the Assignee as against Mrs. Bryar, the fact is that the Assignee by order of the District Court sold the right, title and interest of James Bryar in the land to Thos. Campbell, and that sale was approved by the Court and deed made. When this was done the land passed out of the jurisdiction of the District Court. It might have distributed the proceeds as it saw fit under the law, but that was all. Whether Mrs. Bryar's alleged interest passed by that sale or not, was not to be determined by that Court, but by the State Courts in a proceeding at law. The parties were citizens of Pennsylvania. The law afforded a plain, adequate and complete remedy, by which possession could be obtained. The United States Courts will not entertain an Ejectment Bill. Killian et. al. vs. Ebbinghams Trustees, 110 U. S. 568 Fussell vs. Gregg 113 U. S. 550. Nor will the Courts of Pennsylvania. Long's Appeal 92 Pa. 171. Richard's Appeal 100 Pa. 51.

True, Campbell intervened. He intervened in the bill as it was, and for the purpose of putting before the Court the fact of his purchase as a reason for no further proceedings, and dismissing the bill. He certainly had no reason to suppose that because he intervened he was to be held for any and everything that the Plaintiff might thereafter conclude to ask for and the Court grant, and particularly that he thereby agreed that the bill might be turned into an ejectment bill, by which he was to lose his land, and be compelled also *to make a deed or deeds therefor to Jane Bryar "or whom she should appoint."* Besides, if the Court did not have jurisdiction, his consent, if there was any, would not stand in the way of his

objecting, at any stage of the proceedings, and it would be proper for the Court itself to throw out the bill even when there was no demurrer or objection (Appeal of Pittsburg & Allegheny Drove Yard Co. 123 Pa. 250), because if for no other reason such bill is in the teeth of the 16th Section of the Judicial Act of 1789, which provides "that suits in equity shall not be sustained in either of the Courts of the United States in any case where plain, adequate and complete remedy can be had at law."

Parker vs. Winnipiseogee, etc. 2nd Black 55.

III. Appellants *now* claim that for certain reasons the appeal was not properly in the Circuit Court. These reasons are purely technical and are that the appeal was allowed too late, notice not given to the Clerk of District Court or to Jane Bryar, and the appeal not entered at the proper term of Circuit Court and record not brought into the Circuit Court.

If either of the positions argued above be correct it affords a complete answer to the appellants' contention now under consideration. Besides, no matter if all that the appellants claim on this point be true, it is an after thought and without merit now. The reason is this: The Circuit Court had jurisdiction on appeal and also supervisory powers over the District Court sitting in Bankruptcy. (Revised Statutes, Section 4979.)

When these appellants came into the Circuit Court it was with the declaration that "an appeal was *duly* allowed," but asking that the appeal be dismissed because of the failure to bring up the record, pay the entry costs and prosecute the appeal to the next court, and asked for *a decree of the Circuit Court declaring the appeal deserted and affirming the decree of the District Court.* (See record, p. 28). They admitted that the case was properly in the court by appeal, and that the power of the Circuit

Court was plenary. Next, by stipulation of 28th January, 1897, printed in full in appendix to this book, and given in substance in the docket entries (see Record 1, 2), they agreed that the substitution of the heirs of Jane Bryar be taken and considered as a regular bill of revivor; that Campbell's answer (Record 28, 29) be taken as a cross bill, and the case heard upon the record before the court, which record contained the testimony taken in District and Circuit Courts.

How is it possible for appellants to now deny the jurisdiction or allege that the case was not legally in the Circuit Court (whichever be their position) when they declared that the appeal was duly allowed, and then agreed that a bill of revivor and cross bill should be filed in the Circuit Court? How can they, after the case has been heard and decided upon the merits, deny the record upon which they agreed that the case be heard and decided?

But to take up the argument as made by Appelants'. Appeals are allowed by Section 4980 Revised Statutes, from the District to the Circuit Court in equity, when the amount in controversy exceeds five hundred dollars. Section 4981 provides: "No appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from, nor unless the appellant at the time of claiming the same, shall give bond in the manner required in cases of appeals in suits in Equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such appeals."

Section 4982 provides: "Such appeal shall be entered at the term of the Circuit Court which shall be held within the district next after the expiration of ten days from the time of claiming the same."

The decree was entered 26th June, 1879. On 30th June, 1879, a bond for costs on appeal to the Circuit Court was filed in the District Court. It seems to be true that no order of Court was made allowing the appeal until 16th July, 1879, but one was made at that time. It does not seem to us that there was any necessity for any allowance of appeal by the Circuit Court under the statue, certainly that it was not necessary that such allowance should be within ten days. The appeal is to be *claimed* and notice given within ten days, and bond to be given at the time of claims. Appeals are of right when the amount exceeds five hundred dollars. Here, the "bond for costs on appeal to Circuit Court" was filed 30th June, 1879. This may well be taken as a claim for what is a matter of right and a sufficient compliance with the Act. If filed with the Clerk of the District Court, it is apparent that that is notice to him and notice to both the Clerk and Mrs. Bryar is now presumed because of Appellants' motion of December, 1895, which does not allege that notice was not given either to the clerk or Mrs. Bryar.

Section 4982 provides that "such appeal shall be entered at the term of the Circuit Court which shall be held within the district next after the expiration of ten days from the time of *claiming* the same."

The next term began 2nd Monday November, 1879, and continued to 2nd Monday May, 1880. The Clerk of the District Court certified the decree, petition, allowance of appeal, copy of docket entries and bond for costs to the Circuit Court, where they were filed 30th August, 1879 (Record 1). During the next term, viz: January

1880, Mrs. Bryar elected to proceed in the State Court and brought her ejectment.

Nor are appellants in any better position if we assume, for the sake of the argument, that the appeal was under the general procedure in equity.

Section 631 of Revised Statutes gives an appeal from all final decrees of a District Court in Equity, where the amount in dispute exceeds fifty dollars, exclusive of costs; and

Section 632 provides, "in case of an appeal, as provided by the preceding section, copies of the proofs and of such entries and papers on file as may be necessary on hearing of the appeal *may* be certified up to the Appellate Court."

The language of this section is an answer to the contention under consideration.

The provisions of the Revised Statutes as to appeals to the Supreme Court are radically different from those as regards appeals to the Circuit Court. As quoted, in appeals to the Circuit Court, copies of the proofs, entries and papers *may* be certified.

But as regards appeals to the Supreme Court the requirements are different and mandatory.

Section 698 reads as follows: "Upon the appeal of any cause in equity * * a transcript of the record as directed by law to be made, and copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court."

Section 997 provides that "There shall be annexed to and returned with any writ of error for the removal of a cause at the day and place therein mentioned, an authen-

ticated transcript of the record, an assignment of errors and a prayer for reversal with a citation to the adverse party," and

Section 1012 provides that "Appeals from the Circuit Courts and district courts acting as Circuit Courts, and district courts in prize causes, shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in case of writs of error."

Again: In cases of appeals to the Supreme Court the rule that a copy of the record must be filed within the term to which the appeal is returnable is subject to exceptions, and upon sufficient excuse shown the Court will retain the case. (Grigsby vs. Purcell, 99 U. S. 506–507.) The Court there said: "The real objection is not that this Court has no jurisdiction, but that the plaintiff in error, or appellant, as the case may be, has failed to duly prosecute his suit."

In this case there was ample excuse for Campbell's apparent failure caused by the action of Jane Bryar. If the Supreme Court, under its statutes, can relieve an appellant, the Circuit Court in this case had a right under its statutes to do as it did, and the case is then one of the exercise of a judicial discretion, which is not reviewable.

W. B. RODGERS,

Counsel for Appellee.

STIPULATION.

JANE BRYER, by her next friend, ROBERT BRYER, *vs.* JAMES BRYER and ROBERT ARTHURS.	No. ——, May Term, 1877.

And now, 28th January, 1897, it is stipulated and agreed between counsel, as follows:

That substitution of the heirs of Jane Bryar, deceased, of January 27th, 1896, be taken and considered as regularly filed as a bill of revivor in this case.

And that the answer of Thomas Campbell, filed 28th January, 1896, be taken as a cross bill.

It is further agreed that the case shall be heard upon the record now before this Court.

L. C. BARTON,
Attorney for Bryar Heirs, Appellees.

W. B. RODGERS,
Attorney for Thomas Campbell.

OPINION OF SUPREME COURT OF PENNSYLVANIA.

JANE BRYAR
vs.
THOS. CAMPBELL, ET AL. } No. , October Term, 1881.

Per Curium.

The fact that the mortgages of McClintock and James on the premises were valid liens, and the mortgagees entirely unaffected by any notice of the secret equity of Mrs. Bryar was undisputed, and the consequence necessarily followed that, whether Campbell had notice or not, he stood in their shoes when he purchased the title derived from them.

It is contended, however, that Campbell having bought at the assignee's sale, subject to these mortgages, was bound to pay them off, and when he did so, they were extinguished. But unless he expressly or by necessary implication *agreed* to pay them, he was not bound to do so, and had an undoubted right to secure his own title by purchasing them and proceeding to perfect his title under them.

Judgment affirmed.

Appeal of JANE BRYAR. | No. 63, October and November Term, 1885.

(Reported in 111 Pa. St., page 81.)

Mr. Justice Trunkey delivered the opinion of the Court January 4, 1886.

Robert Arthurs, assignee of James Bryar, a bankrupt, sold and conveyed the land to Thomas Campbell, for consideration of $3,500, subject to the lien of two mortgages, one to T. McClintock and the other to E. R. James. Subsequently; said Campbell, by his attorney, purchased said mortgages and the judgments which had been obtained thereon, issued a writ of *levari facias* on one of them, by virtue of which the land was sold at sheriff's sale for $50, and on November 18, 1881, the attorney conveyed the title acquired at the sheriff's sale to Campbell.

By the purchase at the assignee's sale Campbell obtained Bryar's equity of redemption, and as respects him nothing more. He bought the land subject to the mortgages, and there is no way that he could hold the land under that purchase and compel Bryar to pay the whole or a part of the debt. His bid was in addition to the debts secured by the mortgages. He contracted no personal liability, and was at liberty to suffer the mortgagees to cause the land to be sold at judicial sale, in which case he could have bought it himself. But when he chose to hold the equity of redemption, and purchased the debt, he freed Bryar from liability for its

payment, and can collect no part thereof out of Bryar's other property, if he has any.

Dollar Savings Bank vs. Burns, 87 Pa. St., 491.

A sheriff's sale of land on a judgment divests the dower of the debtor's wife. And if necessary for the payment of a decedent's debts to sell real estate, the sale thereof by order of court for that purpose divests the widow's dower or estate under the intestate laws. Mortgages are commonly called securities for payment of money, or performance of contract. They are our highest form of securities; in some respects more than a lien, for they are formal pledges of the land. Therefore, no part of mortgaged land is exempted from sale in satisfaction of the mortgage by virtue of the statute exempting "property to the value of three hundred dollars from levy and sale on execution, issued upon any judgment obtained upon contract." Gangwere's Appeal, 36 Pa. St., 466. And the statute which provides that the "widow or children of any decedent, dying within this commonwealth, may retain either real or personal property belonging to said estate to the value of three hundred dollars, and the same shall not be sold, but suffered to remain for the use of the widow and family," has no force against a mortgage given by the decedent in his lifetime. Nerpel's Appeal, 91 Id., 334. A first mortgage is unaffected by a sheriff's sale upon a subsequent lien; the purchaser at such sale buys the equity of redemption. The mortgagee, like a purchaser, is not prejudiced by a secret equity or title, of which he had no knowledge or notice, and where there were no circumstances to put him on inquiry. When Bryar's land was sold by the assignee, he was bankrupt, his whole estate was liable for his debts, and after that sale he had no equitable interest in the land. His wife, under the laws of this commonwealth, had no estate in his land that could stand against his creditors. The sale by the assignee in bankruptcy

did not divest her dower, but she had no equity to prevent a sheriff's sale on a judgment against her husband. Campbell acquired the title of the mortgagees and their right of possession, and had he not been in possession he could have recovered in ejectment. The sheriff's sale is unimpeached for fraud—it evidences that the land was worth no more than the mortgage debts.

A mortgage does not necessarily merge or become extinct by being united in the same person with the fee. When a person becomes entitled to an estate, subject to a charge for his own benefit, he may take the estate and keep up the charge. The question in such case is upon the intention, actual or presumed, of the persons in whom the estates are united. Moore vs. Harrisburg Bank, 8 Watts, 138. Campbell had an interest in preserving the mortgages until after foreclosure and sale, for the purchaser at such sale would take as good title as the mortgagor appeared to have. If the mortgagee had no knowledge of an adverse title he had a right to perfect his title if he could, but he was not bound to buy the property if another should bid a larger sum than he cared to pay. The question is not whether he could purchase the mortgage and use it to compel the debtor to pay it, but whether he can use it to protect himself against adverse claims which could not avail against the mortgagee, or any one holding under him. At the sheriff's sale upon the judgment on the mortgage, all persons were as free to bid as if there had been no sale by the assignee, and the purchaser took title under the mortgagee. It was said by the late Chief Justice that Campbell, unless he expressly or by necessary implication agreed to pay the mortgages, had an undoubted right to secure his own title by purchasing them and proceeding to perfect his title under them. Bryar and Wife vs. Beckett, et al., 13 Pitts. L. J. N. S., 12. In that case the present appellant and appellee were the parties really interested, and the plaintiff claimed to recover on an equitable title, of which

the mortgagees had no knowledge. The judgment was entered against the plaintiff because the sheriff's sale vested the title in Campbell. In this action the plaintiff claims dower in part of the tract which was not included in her equitable title, and her counsel has made a very ingenious argument in support of her claim, but we are not convinced that the controlling principle in the recent decision should be overruled.

Decree affirmed and appeal dismissed at the costs of appellants.

BRYAR *v.* CAMPBELL.

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APPEAL FROM THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 227. Argued April 12, 1900. — Decided May 14, 1900.

Plaintiff's intestate, a married woman, filed a bill in the District Court of the United States against her husband's assignee in bankruptcy and the purchaser of a lot of land at the assignee's sale, setting forth her equitable claim to the property, and praying that the purchaser be required to convey to her. A decree was entered in her favor and an appeal taken to the Circuit Court by Campbell, the purchaser. Plaintiff did not press the appeal, but began a new action in ejectment in a state court against the defendant, Campbell, who set up a new title in himself and recovered a judgment. Thereupon, and sixteen years after the decree in her favor in the District Court, plaintiff moved to dismiss the appeal to the Circuit Court. This motion was denied. Thereupon she set up the decree in her favor, although it had not been pleaded by either party in the state court. *Held:*

(1) That the plaintiff having abandoned her suit in the District Court, it was too late to move to dismiss the appeal;

(2) That the decree not having been pleaded in the state court could not now be resuscitated;

(3) That the judgment of the state court was *res adjudicata* of all the issues between the parties, and that the decrees of the Circuit Court and Circuit Court of Appeals reversing the decree of the District Court and dismissing plaintiff's bill should be affirmed.

THIS was a suit in equity instituted in the District Court for the Western District of Pennsylvania, April 30, 1877, by Jane Bryar against James Bryar, her husband, and Robert Arthurs, his assignee in bankruptcy, to enjoin the latter from partitioning or offering for sale an undivided half of seven acres of land in the city of Pittsburgh, for which, as she alleged, a conveyance had been made by mistake to her husband, though she had paid the purchase money with her own individual funds. Notwithstanding the pendency of this bill the assignee proceeded to sell the land at assignee's sale to the defendant Thomas Campbell, subject to the two mortgages hereinafter mentioned. On August 15, 1878, Campbell was permitted to intervene and de-

fend the bill, the bill being amended by a new prayer that the defendants make, execute and deliver to the plaintiff a deed for the property in question.

The case was heard upon pleadings and proofs, and on June 26, 1879, a decree was rendered in favor of the plaintiff, declaring her to be the equitable owner of the land in suit; that defendant Campbell was chargeable with notice of her rights, and was bound to convey according to the prayer of the bill. An appeal was immediately taken by Arthurs and Campbell to the Circuit Court, where the case was docketed August 30, 1879. Here the case rested, without further action, for sixteen years, and until December 20, 1895.

Meantime, however, and in February, 1880, Jane Bryar and her husband in her right, began an action of ejectment in the Court of Common Pleas of Allegheny County against Thomas Campbell, John W. Beckett and William B. Rodgers, for the land in controversy, which resulted, May 19, 1881, in a verdict for the defendants, and a writ of error from the Supreme Court of Pennsylvania, which, on November 14, 1881, affirmed the judgment of the Court of Common Pleas. 30 Pitts. Legal Jour. 12.

Nothing further appears to have been done until December 30, 1895, when Mrs. Bryar moved the Circuit Court for the Western District of Pennsylvania for an order declaring the appeal of Thomas Campbell from the decree of the District Court, deserted, upon the ground that the appellants had failed to bring up the record from the District Court, to pay the entry costs, or to prosecute their appeal to the next term of the Circuit Court. Campbell filed an answer to this motion, setting up his purchase of the land at assignee's sale, and stating that he had not prosecuted his appeal because he had purchased a mortgage made by James Bryar to Edward R. James, upon which mortgage the property had been sold to his attorney, William B. Rodgers, who had conveyed to him; that he went into possession of the land; that the petitioner and her husband had brought the action of ejectment against him above referred to, and a verdict had been rendered in favor of the defendants; that he believed the result of the ejectment case made it unnecessary

for any further proceedings upon the appeal, and that he and his vendees had ever since been in undisputed possession of the land. The motion to dismiss the bill, or rather to declare the appeal deserted, was denied, and the death of the plaintiff Jane Bryar being suggested, it was ordered that her heirs at law, the appellants, be substituted as plaintiffs.

The appeal subsequently went to a hearing in the Circuit Court upon the former testimony, and new testimony put in by Campbell in support of his answer, and resulted in a reversal of the District Court, and a dismissal of the bill. Plaintiffs appealed to the Circuit Court of Appeals, which affirmed the decree of the Circuit Court, 62 U. S. App. 435, whereupon plaintiffs appealed to this court.

Mr. Edward Campbell and *Mr. Lowrie C. Barton* for appellants.

Mr. W. B. Rodgers for appellee.

Mr. Justice Brown, after making the above statement, delivered the opinion of the court.

Plaintiffs ask for a reversal of this decree upon the grounds, first, that the appeal from the District Court to the Circuit Court in bankruptcy was not claimed and notice given to the clerk of the District Court within the time prescribed by the rules; and, second, because it affirmed the decree of the Circuit Court upon its merits.

1. If there be anything in the defence that the appeal from the District Court to the Circuit Court in the bankruptcy proceedings was not taken within the time prescribed by law, it comes too late. It is true that Rev. Stat. sec. 4981, declares that "no appeal shall be allowed in any case from the District to the Circuit Court, unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision ap-

pealed from." It appears that the decree of the District Court was entered June 26, 1879, and that a petition for an appeal was addressed to the judge of the Circuit Court, the jurat to which was dated June 28, and on June 30 a bond for costs on appeal was filed. The appeal, however, to the Circuit Court was not allowed and filed until July 16, twenty days after the decree of the District Court, and it does not appear that any notice was given to the clerk of the District Court, or to the defeated party, as required by section 4981; but it further appears that the petition for appeal, the allowance thereof, a copy of the docket entries and a bond for costs were filed in the Circuit Court, August 30, 1879. Here the matter rested until December 20, 1895, when Mrs. Bryar, the prevailing party, moved the Circuit Court, not to dismiss the appeal for the reason that it was not taken in time, but, stating that it had been "duly allowed," to obtain an order declaring it deserted, for the reason that the appellants had failed to bring up the record from the District Court, pay the entry costs or prosecute their appeal. This was apparently treated as a motion to dismiss, and was denied. After a lapse of sixteen years it is now too late to ask this court to hold that the appeal should have been dismissed for a reason which does not seem to have been called to the attention of the Circuit Court, when the original motion was made to declare the appeal deserted. If the plaintiffs in that case had intended to insist upon their rights under the decree, they should either have moved to dismiss the appeal within a reasonable time, or pressed it to a hearing in the Circuit Court, instead of abandoning it and bringing a new suit upon the same cause of action in the state court.

2. The case upon the merits depends upon the effect to be given to the judgment in favor of Campbell in the ejectment suit brought by Mrs. Bryar in the state court. Mrs. Bryar appears, for some unexplained reason, to have abandoned her original suit in the District Court, notwithstanding the decree in her favor, and to have elected to begin an action in ejectment in the state court. To this action Campbell appears to have set up a new defence, which had accrued since the decree in the District Court, arising upon two mortgages executed in

1874 by James Bryar, namely, one to Thomas McClintock for $3000, the other to E. R. James for $2000, which mortgages were, in 1878, foreclosed and judgment entered. In the opinion of the Supreme Court of the State it is stated that William R. Rodgers, one of the defendants in the ejectment action, as the attorney for Campbell, purchased the judgments obtained upon the mortgages, issued execution, sold the seven acres at sheriff's sale, and bought the same for $50. A deed was made by the sheriff to Rodgers, who gave a memorandum to Campbell, stating that he would convey to any one Campbell might wish, when requested so to do. It was not disputed that Rodgers bought and held in trust for Campbell whatever title he obtained by the sheriff's deed.

Upon this state of facts the court held that the mortgages were valid liens, and the fact that the mortgagees were entirely unaffected by any notice of the secret equity of Mrs. Bryar being undisputed, it necessarily followed that, whether Campbell had notice or not, he stood in their shoes when he purchased the title derived from them. "It is contended, however, that Campbell having bought at the assignee's sale, subject to these mortgages, was bound to pay them off, and when he did so they were extinguished. But unless he expressly or by necessary implication agreed to pay them, he was not bound to do so, and had an undoubted right to secure his own title by purchasing them and proceeding to perfect his title under them." It will be seen from this that Campbell did not rely upon his purchase at the assignee's sale, as to which the District Court seems to have held that he had notice of Mrs. Bryar's equity in the premises, but upon the purchase of the rights of the mortgagees, who appear to have taken the mortgages, supposing the property to belong to James Bryar, in whose name it stood upon the record.

We are advised of no substantial reason why the judgment of the state court does not operate as *res judicata* in this case. The original suit in the District Court was begun by Mrs. Bryar, one of the original plaintiffs in the ejectment suit, for the purpose of compelling the defendant Thomas Campbell to convey to her as the equitable owner thereof the premises now in dis-

pute. The ejectment suit was begun by her and her husband, in her right, upon the same title against three defendants, one of whom was Campbell, to obtain possession of the same property. The action was brought by Mrs. Bryar upon her equitable title, a procedure allowable in the courts of Pennsylvania, where an equitable ejectment is the full equivalent of and substitute for a bill in equity. *Peterman* v. *Huling*, 31 Penn. St. 432; *Winpenny* v. *Winpenny*, 92 Penn. St. 440. Such procedure, though not authorized by the practice of the Federal courts, will be respected when the question arises upon the effect to be given the judgment. *Miles* v. *Duryee*, 7 Cranch, 481; *Miles* v. *Caldwell*, 2 Wall. 36; *Faber* v. *Hovey*, 117 Mass. 107. While it appears from the opinion of the Supreme Court of the State that the decree of the District Court was called to its attention, it was not set up as a bar to the ejectment in the state court for the obvious reason that Mrs. Bryar had abandoned it by bringing suit in the state court, and there was no object in pleading it, while Campbell did not plead it because it was adverse to him. It would seem, too, that under the practice in Pennsylvania a decree cannot be used as *res judicata* pending an appeal to a higher court. *Souter* v. *Baymore*, 7 Penn. St. 415. He could not even plead the pendency of the former suit. *Smith* v. *Lathrop*, 44 Penn. St. 326; *Stanton* v. *Embrey*, 93 U. S. 548, 554.

It is now contended that the existence of this prior decree ousted the jurisdiction of the state court. Indeed the only object of Mrs. Bryar in endeavoring to have the appeal dismissed seems to have been to reinstate the original decree in her favor more effectually, and to insist that it was a final disposition of the matters in controversy between herself and Campbell. The question is whether, having abandoned the original decree for a new action in the state court in which she was defeated, her heirs can now claim that the original decree in the District Court, though not set up as a bar by either party, and notwithstanding the appeal, can be resuscitated after a lapse of sixteen years for the purpose of defeating the action of the state court. To state this proposition is to answer it. The state court was at liberty to proceed to dispose of the case upon

the issues made by the parties, and as neither party saw fit to set up the former decree as a bar to the action, the state court was not bound to notice it. It did not affect in any way the jurisdiction of that court. In addition to this, however, Campbell relied upon a wholly different defence from that set up by him in the former suit, and one which had accrued to him after the decree in that court was rendered. Whether the decree, if properly pleaded, would have operated as a bar it is unnecessary to determine. As the same issues are presented here as were presented in the state court, it is entirely clear that they cannot be relitigated.

The judgment of the state court was conclusive upon these issues, and the decree of the Circuit Court of Appeals to that effect was correct, and it is

Affirmed.